TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~966.~~ ~~622~~ 340

THE FACTORS' AND TRADERS' INSURANCE COMPANY,
PLAINTIFF IN ERROR,

VS.

WIDOW MARY MURPHY ET. AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

FILED OCTOBER 8, 1881.

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STATE OF LOUISIANA:

Fifth district court for the parish of Orleans.

MRS. MARY MURPHY, APPELLEE, *vs.* FACTORS' & TRADERS' INS'CE CO. & ALS., APPELLANTS.	No. 7255.

J. D. Coleman, att'y for pl'ff & appellee.

Gibson & Gibson, Singleton & Brown, G. L. Hall, and B. Egan, att'ys for def'd'ts & appellants.

Transcript of appeal, returnable to the supreme court of Louisiana on the first Monday of November, 1876.

Supreme court of Louisiana. Filed 3d November, 1876.
(Signed) M. P. JULIAN,
D'y Clerk.

1 STATE OF LOUISIANA:

Fifth district court, for the parish of Orleans.

WIDOW MARY MURPHY *vs.* FACTORS' & TRADERS' INSURANCE COMPANY and others.	No. 7255.

Petition.—Filed 16th, *March* 1876.

To the honorable E. North Cullum, judge of the fifth district court for the parish of Orleans:

The petition of Widow Mary Murphy, of the city of New Orleans, with respect, represents that the Factors' & Traders' Insurance Company, a duly incorporated institution under the laws of the State of Louisiana, and whereof Ed. A. Palfrey is president, domiciled in this city; E. E. Norton, assigneee of Paul Cook & Co. and Paul Cook and Justus Vairin, jr., bankrupts; and Marshall J. Smith, trustee of the creditors of said Paul Cook & Co. and Paul Cook and Justus Vairin, jr., in the matter of Paul Cook & Co. & Paul Cook and Justus Vairin, jr., bankrupts, No. 1113 of the docket of the United States district in bankruptcy, also of this city, are justly and truly indebted in solido to your petitioner in the full sum of twenty thousand ($20,000.00) dollars, with 8 % interest per annum from March 21st, 1871, until paid, for this, to wit:

2 Your petitioner is the legal holder and owner, before maturity of two promissory notes each for the sum of ten thousand ($10,000.00) dollars, dated, made, and executed at New Orleans on March 18th, 1870, payable one year after date, drawn by Paul Cook and Justus Vairin, jr., to their own order and by themselves endorsed, paraphed "ne varietur" by Theodore Guyal, notary public of this city, to identify them with an act of mortgage passed before him on said

March 18th, 1870, and are secured by mortgage on the property fully described in said act, which act of mortgage, together with said two notes, are hereto annexed and filed herewith as part hereof, and marked respectively A, B, & C.

Your petitioner represents that said notes are two of a series of four executed by the said above-recited parties under the aforesaid martgage, and that the Factors' & Traders' Ins'ce Co. is the owner of the other two of said series of Notes.

Your petitioner further represents that Paul Cook & Co., and Paul Cook & Justus Vairin, jr., were adjudicated bankrupts, on their own petition, on the 21st day of February, 1871, and that E. E. Norton was constituted assignee of said bankrupts; that subsequently Marshall J. Smith was chosen trustee by the creditors, who participated in said proceedings in bankruptcy, and that his said selection as trustee was confirmed by order of the United States district court in bankruptcy.

Petitioner further represents that said bankrupts surrendered
3 in bankruptcy, as part of their estate, the aforesaid property
mortgaged as aforesaid, to secure the payment of the said notes
held by petitioner, and that the said E. E. Norton, assignee, and Marshall J. Smith, trustee, in their respective capacities as aforesaid, had successively control and management of the estate of said bankrupts.

Now your petitioner alleges that by virtue of an order of the honorable the district court of the United States, at the instance and suggestion by motion of the said Marshall J. Smith, trustee, the said afore-described property was adjudicated at public auction, by Nash & Hodgson, auctioneers, to C. J. Leeds, acting for and on behalf of his firm, C. J. Leeds & Co.; M. D. Lagan, for the firm of Lagan & Mackison; John Hennesey, acting for himself and T. A. Archer, as liquidator of the firm of Marshall J. Smith & Co.; and the Factors' & Traders' Ins'ce Co., through its president, Harman Doane; that said sale was made on December 21st, 1872, and that on June 20th, 1873, all of the afore-described property was sold, subject to petitioner's mortgage as aforesaid, to the Factors' & Traders' Ins'ce Co., through Harman Doane, its then president, by act past before T. C. Cuvillier, notary public, on said 20 June, 1873, the said Factors' & Traders' Ins'ce Co. becoming thereby sole owners of said property and liable to petitioner in the full amount of said notes, with special mortgage on said property; and that your petitioner is en-
titled to have the said afore-described property seized and sold
4 to pay her said mortgage, interests, and costs, together with
attorneys' fees, fixed at 5 % on the amount sued for, in said act
of mortgage.

Your petitioner further represents that by virtue of the aforesaid proceedings and the purchase by the Factors' & Traders' Ins'e Co. of the property hereinbefore described and referred to, that the mortgage to the extent of the interest held therein by said Factors' & Traders' Ins'ce Co. to secure the payment of the two notes held by it became extinguished by confusion, and that said mortgage has (and is of) full force and effect, only to the extent of petitioner's interest therein, to secure the payment of the notes held and owned by petitioner and made part hereof, together with interest, attorney's fees, &c., as stipulated in said act of mortgage.

Petitioner further represents that she was in no manner a party to the said proceedings in bankruptcy in the matter of Paul Cook & Co. and Paul Cook and Justus Vairin, jr., bankrupts as aforesaid, and that she had no knowledge of and took no part in any of the proceedings above recited, and cannot be affected or concluded thereby.

Wherefore, the premises considered, your petitioner prays that the
Factors' and Traders' Ins'ce Co., through Edward A. Palfrey, its presi-
dent; E. E. Norton, assignee in bankruptcy of Paul Cook & Co.
5 and Paul Cook & Justus Vairin, jr.; and Marshall J. Smith,
trustee of said creditors of said bankrupts, be separately cited to
defend this suit, and, after due proceedings had, that there be judgment in favor of your petitioner and against said Factors' & Traders' Ins'ce Co., E. E. Norton, assignee as aforesaid, and Marshall J. Smith, trustee as aforesaid, in solido, for the aforesaid sum of twenty thousand dollars, with 8 % per annum interest from March 21st, 1871, until paid, 5 % attorney's fees, with special mortgage on the property fully described in the act of mortgage hereof made part, and marked C.

That the mortgage on the property hereinbefore described, to the extent of the interest that the Factors' & Traders' Ins'ce Co. may have had by virtue of its ownership of the two notes as hereinbefore alleged, be decreed by this honorable court to have been extinguished by confusion, that petitioner's mortgage on said property be recognized and enforced by this honorable court, and that said property be sold to pay the debt due your petitioner as aforesaid, and your petitioner prays for costs and all general and equitable relief, &c.

(Signed) JAMES D. COLEMAN,
Attorney.

6 *Act of mortgage, marked C, annexed to petition.—Filed 16th March, 1876.*

WIDOW MARY MURPHY
vs.
FACTORS' & TRADERS' INS. CO. & OTHERS. } No. 7255.

UNITED STATES OF AMERICA,
State of Louisiana, City of New Orleans:

Be it known that on this eighteenth day of the month of March, in the
year of our Lord one thousand eight hundred and seventy, before me,
Theodore Guyol, a notary public duly commissioned and sworn in and
for this city and the parish of Orleans, therein residing, and in the presence
of the witnesses hereinafter named and undersigned, personally ap-
peared Paul Cook and Justus Vairin, jr., both residing in this city, who
declared and acknowledged that they are justly and truly indebted unto
Samuel L. Moss, also of this city, in the full sum of forty thousand dol-
lars, for which they have given and furnished four several promissory
notes for the sum of ten thousand dollars each, all drawn by them
jointly and in solido, to the order of and endorsed by themselves, dated
this day and made payable one year after date, which notes, bear-
7 ing eight per cent. interest from and after maturity until paid,
after being countersigned and paraphed "ne varietur" by me,
notary, to identify them with this act, were delivered to the said Moss, who hereby acknowledges the receipt thereof. And in case it should become necessary to institute legal proceedings for the recovery of the amount of the said notes, or of any part thereof, the said Cook & Vairin bind themselves to pay the fees of the attorney-at-law who may be employed for that purpose, which fees are hereby fixed at five per cent. on the amount sued for.

Now, therefore, in order to secure the punctual payment of the said notes at maturity, together with all interest and attorneys' fees, the said Cook & Vairin declared that they do by these presents mortgage,

affect, and specially hypothecate in favor of the said Samuel L. Moss, and to enure to the use and benefit of any and all future holder or holders of the said notes, the said Samuel L. Moss being here present, and accepting for himself, his heirs, and assigns, fourteen lots of ground, situate in the first district of this city, in the square bounded by Pearl, Louisa, New Levee, and Delord streets, and designated as lots Nos. six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, nineteen, twenty, twenty-one, twenty-two, on a plan drawn by C. F. Zimpel, on the 10th March, 1835, and deposited in the office of
8 W. Y. Lewis, late a notary public in this city. Lots Nos. seven,
eight, & nine measure each twenty feet eleven inches front on Pearl street, by ninety-six feet eight inches in depth. Lots Nos. ten, eleven, & twelve measure each twenty feet eleven inches front on Pearl street, by ninety-six feet eleven inches in depth. Lot No. thirteen measures twenty-one feet front on Pearl street, by one hundred & five feet eight inches in depth on the division line of lots Nos. twelve & nineteen; thence on the rear line running towards Pearl street twenty-eight feet, where it forms a point; thence from said point towards Delord street about five feet until it intersects the division line of lot No. fourteen; thence on said division line about eighty-five feet to the place of beginning. Lot No. nineteen measures twenty feet eleven inches front on the rear division line of lot No. twelve, about forty feet on the division line of lot No. twenty, about thirty-six feet on the division line of property formerly belonging to S. J. Peters, and about nine feet on the line of lot No. thirteen. Lot No. fourteen having twenty-one feet front on Pearl street, by eighty-five feet in depth on the other side, and ninety feet in depth on the other side, and twenty feet in width in the rear. Lot No. fifteen having thirty-six feet front on Pearl street, about ninety feet on the line of lot No. fourteen; thence on the rear line towards Delord streets about twenty-nine feet; thence on a line towards Pearl street about forty-six feet; thence on a line parallel with
9 the rear line twenty-nine feet eight inches; thence to the place
of beginning fifty feet six inches. Lot No. six measures twenty-nine feet five inches and five lines front on Louisa street, by eighty-four feet five inches & five lines in depth and front on Pearl street. And lots Nos. twenty, twenty-one, and twenty-two adjoin each other, and measure together sixty-three feet one inch and six lines front on New Levee street, sixty-two feet nine inches in width in the rear, one hundred & twelve feet four inches and three lines in depth on the division line of lot No. nineteen, and one hundred & four feet ten inches and four lines on the division line of lot No. twenty-three; together with all the buildings and improvements on the said lots of ground, known as the Orleans Refinery, and all the machinery, engines, and appurtenances thereunto belonging.

The said described property was purchased by the said Cook & Vairin partly from the Tudor Ice Company, by act passed before P. C. Cuvillier, notary, on the 1st May, 1867, and partly from John T. Osborn, by act passed before William L. Peel, notary, on the 25th day of March of the same year.

And the said Cook & Vairin do hereby promise and bind themselves not to sell, alienate, or in any wise encumber the said described property to the prejudice of this act.

10 United States internal revenue stamps to the value of forty dollars are hereunto affixed and duly cancelled.

According to the annexed certificate of the recorder of mortgages of this city, there are no other mortgages in the name of the said Vairin &

Cook recorded against the said property than, 1st, the draining privilege; 2d, the mortgage they granted in favor of J. T. Osborne, in their act of purchase of lots No. 20, 21, & 22, to secure $4,050, now reduced by payment of $2,025; 3d, and the mortgage they granted in favor of the Tudor Ice Company, by act before P. C. Cervillier, notary, on the 1st May, 1867, to secure $20,000 capital, $4,800 interest, on which $7,360 have been paid.

And the said mortgagors moreover bind themselves to keep the buildings on the said property constantly insured against loss by fire to an amount not less than forty thousand dollars, and to transfer the policies of insurance to the said mortgagee until the full and final payment of said notes, hereby consenting and agreeing that the said mortgagee shall have the right to transfer such policies to any future holder or holders of the said notes, and that in case of failure of the said mortgagors to effect such insurance the holder or holders of the said notes shall have the right to do so, and the reimbursement of all sums paid
for that purpose shall be secured by the present mortgage. But
11 this clause shall not be construed as obligatory on such holder
or holders, or as making them liable for any loss, damage, or injury which may result from the non-insurance of said buildings.

And now to these presents personally came and appeared Madam Elizabeth C. Sherry, of lawful age, wife of the said Vairin, and Mrs. Elizabeth T. Simmons, also of lawful age, wife of the said Cook, who, after having taken cognizance of the foregoing act, which I, the notary, carefully read and explained to them, declared and said that they approve and ratify the same; and further, that it is their wish and intention to release in favor of the said mortgagee, his heirs and assigns, the property herein described from the matrimonial, dotal, paraphernal, and other rights, and from any claims, mortgages, or privileges to which they may be entitled, whether by virtue of their marriage with their said husbands or otherwise.

Whereupon I, the said notary, did inform the said ladies, apart and out of hearing and presence of their said husbands, that they had by law a legal mortgage on the property of their said husbands:

First. For the restitution of their dowry and for the reinvestment of
the dotal property sold by their husbands and which they brought
12 in marriage, reckoning from the celebration of the marriage.

Secondly. For the restitution and the reinvestment of the dotal property by them acquired since marriage, whether by succession or donation, from the day the succession was opened or the donation perfected.

Thirdly. For nuptial presents.

Fourthly. For debts by them contracted with their said husbands; and

Fifthly. For the amount of their paraphernal property alienated by them and received by their said husbands or otherwise disposed of for the individual interest of their said husbands; that in making their intended renunciation they would deprive themselves irrevocably and forever of all rights of reclamation against the property herein described, whether under mortgage privilege or otherwise.

And the said ladies did thereupon declare unto me, notary, that they were fully aware of and acquainted with the nature and extent of the matrimonial, dotal, paraphernal and other rights and privileges thus secured to them by law on the property of their said husbands, and that they nevertheless did persist in their intention of renouncing, not only all the rights, claims, and privileges hereinbefore enumerated and described, but all others of any nature or kind whatever to which they may be entitled by any laws now or heretofore in force in the State of Louisiana.

13 And the said husbands being now present aiding and authorizing the said wives in the execution of these presents, they, the said ladies, did again declare that they did and do hereby make a formal renunciation and relinquishment of all their said matrimonial, dotal, parapheral, and other rights, claims, and privileges in favor of the said mortgagee, binding themselves and their heirs at all times to sustain and acknowledge the validity of this renunciation.

Done and passed at New Orleans, in my office, the day, month, and year aforesaid, in the presence of Armand Guyol and Adlar Pujol, witnesses, who have signed with the appearers and me, notary, after reading the whole.

(Original signed) ELIZABETH T. COOK.
PAUL COOK.
JUSTUS VAIRIN, JR.
E. C. VAIRIN.
S. L. MOSS.
[SEAL.] THEO. GUYOL, *Not. Pub.*
ARMAND GUYOL.
ADLAR POUJOL.

A true copy.
(Signed) THEO. GUYOL, *Not. Pub.*

Certificate of recorder of mortgages attached to act marked "C."

The undersigned, deputy recorder of mortgages for the parish and city of New Orleans, do hereby certify that the mortgage resulting from the foregoing act was recorded in the mortgage office on
14 the 19th day of March, anno Domini 1870, in book 88, folio 570.
New Orleans, May 27th, 1876.
[SEAL.] (Signed) C. PARCANTEL,
D'y Recorder.

Note annexed to petition marked "A."—Filed 16th March, 1876.

WIDOW MARY MURPHY
vs. } 7255.
FACTORS' & TRADERS' INS'CE CO.

$10,000.00.] NEW ORLEANS, 18 *March*, 1870.

Jointly and in solido one year after date we promise to pay to the order of ourselves ten thousand dollars, value received, with interest at the rate of eight per cent. per annum from maturity until paid.

(Signed) PAUL COOK,
" JUSTUS VAIRIN, JR.

"Ne varietur." Secured by mortgage duly stamped this 18th March, 1870.
(Signed) THEO. GUYOL, *Not. Pub.*

(Endorsed:)
(Signed) PAUL COOK,
JUSTUS VAIRIN, JR.

Note annexed to petition, marked "B."—Filed March, 1876.

$10,000.00.] NEW ORLEANS, 18*th March*, 1870.

15 Jointly and in solido, one year after date we promise to pay to the order of ourselves ten thousand dollars, value received, with interest at the rate of eight per cent. per annum from maturity until paid.

(Signed) PAUL COOK.
JUSTUS VAIRIN, JR.

Ne varietur. Secured by mortgage duly stamped, this 18th March 1870.

(Signed) THEO. GUYOL, *Not. Pub.*

(Endorsed:).

(Signed) PAUL COOK,
JUSTUS VAIRIN, JR.

Citation to Factors & Traders Ins'ce. Co., 16 *March*, 1876.

WIDOW MARY MURPHY
vs.
FACTORS' & TRADERS' INS'CE. CO. } No. 7255.

STATE OF LOUISIANA:

Fifth district court for the parish of Orleans, in the city of New Orleans.

Factors' & Traders' Ins'ce Co., through Ed. A. Palfrey, its president.

You are hereby summoned to comply with the demand contained in the petition of which a copy accompanies this citation, or deliver your answer to the same, in the office of the clerk of the fifth district court for the parish of Orleans, within ten days after service hereof.

16 Witness the honorable E. North Collom, judge of the said court, this 16th day of March, in the year of our Lord 1876.

[SEAL.] (Signed) THOMAS DUFFY, *Clerk.*

Sheriff's return.

Received March 16th, 1876, and on the same day, month, and year, I served a copy of the within citation and accompanying petition on Factors' & Traders' Insurance Co., through E. A. Palfrey, its president, in person.

Returned same day.

(Signed) FRANK PFISTER, *D'y Sh'ff.*

Citation to E. E. Norton, assignee, 16 *M'ch*, 1876.

WIDOW MARY MURPHY
vs.
FACTORS' & TRADERS' INS'CE. CO. } No. 7255.

STATE OF LOUISIANA:

Fifth district court for the parish of Orleans, in the city of New Orleans.

E. E. Norton, assignee of Paul Cook & Co., and of Paul Cook and Justus Vairin, jr., bankrupts.

You are hereby summoned to comply with the demand contained in

the petition, of which a copy accompanies this citation, or deliver your
answer to the same in the office of the clerk of the fifth district
17 court for the parish of Orleans, within ten days after the service
hereof.

Witness the honorable E. North Cullom, judge of the said court, this 16th day of March, in the year of our Lord 1876.

[SEAL.] (Signed) THOMAS DUFFY, *Clerk.*

Sheriff's return.

Received March 16th, 1876, and on the 17th day of the same month and year I served a copy of the within citation and accompanying petition on E. E. Norton, assignee of Paul Cook and Justus Vairin, jr., by leaving the same at his domicile, No. 255 Canal street, in the hands of Mrs. E. E. Norton, his wife, a person apparently over the age of 14 years, living and residing in the said domicile, the said E. E. Norton being absent at the time of said service; all of which facts I learned by interrogating the said Mrs. E. E. Norton, his wife.

Returned same day.

(Signed) FRANK PFISTER, *D'y Sheriff.*

Citation to M. J. Smith, trustee, 16 *March,* 1876.

WIDOW MARY MURPHY
vs.
FACTORS' & TRADERS' INS'CE. CO. } No. 7255.

STATE OF LOUISIANA:

Fifth district court for the parish of Orleans, in the city of New Orleans.

18 Mr. Marshall J. Smith, trustee of creditors in bankruptcy of Paul Cook & Co., and of Paul Cook and Justus Vairin, jr., bankrupts.

You are hereby summoned to comply with the demand contained in the petition, of which a copy accompanies this citation, or deliver your answer to the same in the office of the clerk of the fifth district court for the parish of Orleans, within ten days after the service hereof.

Witness the honorable E. North Cullom, judge of the said court, this 16th day of March, in the year of our Lord 1876.

[SEAL.] (Signed) THOMAS DUFFY, *Clerk.*

Sheriff's return.

Received March 16th, 1876, and on the same day, month, and year served a copy of the within citation and accompanying petition on Marshall J. Smith, one of the defendants herein, in person.

Returned same day.

(Signed) FRANK PFISTER, *D'y Sh'ff.*

Exception of E. E. Norton.—Filed 25th March, 1876.

WIDOW MARY MURPHY
vs.
FACTORS' & TRADERS' INS'CE. CO. & ALS. } No. 7255.

Fifth district court, parish of Orleans.

19 Now comes defendant E. E. Norton, and peremptorily excepts to plaintiff's petition, and alleges that the same discloses no cause of action against him.

Wherefore he prays that plaintiff's action, so far as it relates to him, be dismissed and that said exception be maintained.

(Signed) ROUSE & GRANT, *Att'ys.*

Exception of Factors' & Traders' Ins'ce Co.—Filed 27 *March*, 1876.

WIDOW MARY MURPHY
vs.
FACTORS' & TRADERS' INS'CE CO. & ALS. } No. 7255.

Fifth district court parish of Orleans.

Now into court, through their undersigned counsel, come the Factors' & Traders' Ins'ce Co., sought to be made defendants herein and except to the petition of plaintiff upon the following grounds, to wit:

That petitioner discloses no cause of action against these defendants.

That the form of action is not such as the law requires in such cases, and that if plaintiff have any remedy, being a concurrent mortgagee, as set forth in her petition, it is against the proceeds of the sale of said property and not against the present holders.

20 That the petitioner was one of the persons to whom the said property at said sale was adjudicated, and cannot therefore now bring this suit.

That by said adjudication petitioner's notes and mortgages were confused and extinguished.

Wherefore respondents pray that this suit may be dismissed at petitioner's costs, and for all general relief in law and equity.

(Signed) GIBSON & GIBSON,
Att'ys for F. & T. Ins'ce Co.

Default vs. M. J. Smith trustee.—Minutes, 31st March, 1876.

WIDOW MARY MURPHY
vs.
FACTORS' & TRADERS' INS'CE CO. & OTHERS. } No. 7255.

On motion of J. D. Colman, of counsel for plaintiff, and on showing to the court that the defendant Marshall J. Smith, trustee, &c., has failed to answer, although duly cited,

It is ordered by the court that judgment by default be entered against him.

Answer of Factors' & Traders' Ins'ce Co. and call in warranty.—Filed 20th April, 1876.

WIDOW MARY MURPHY
vs.
FACTORS' & TRADERS' INS'CE CO. & ALS. } No. 7255.

Fifth district court parish of Orleans.

21 Now into court, by their undersigned counsel, came the Factors' & Traders' Ins'ce Co., one of the defendants herein, and for answer to the petition of plaintiff deny all and singular the allegations thereof, excepting such as may be hereinafter admitted.

Defendants admit that the proceedings in bankruptcy were had in the U. S. district court, in the matter of Paul Cook & Co. and Paul Cook and Justus Vairin, jr., bankrupts, as set forth in plaintiff's petition; and that they (defendants) were the holders and owners of two promissory notes of $10,000.00 each, secured by mortgage upon the said property of Paul Cook & Co., which were concurrent with those now held by plaintiff.

Defendants aver that pursuant to an agreement of the creditors and the order of the United States district court, the said mortgaged property was offered for sale at public auction on the 21st of December, 1872, and was adjudicated to Messrs. Leeds & Co., Logan & Mackison, John Hennessey and T. A. Archer, and your respondents for forty-five thousand dollars, and that solely for the mutual accommodation of said parties it was agreed by the adjudicatees, without any valuable consideration whatsoever, that the title to said property should be taken in the name of the Factors' & Traders' Ins'ce Co., and that said company, for their joint account, should discharge all costs, expenses, charges, taxes, and other claims on said property, and that pursuant
22 to said agreement the conveyance of said property was made to defendants on the 23d June, 1873.

Defendants aver that the parties to whom the said property was adjudicated were all either privilege or mortgage creditors, and in consideration of this circumstance alone they had previously agreed and bound themselves to bid in said property jointly, if it should be necessary, as the only means of protecting their interests in default of a bid equal to the aggregate amount of their claims, and that the sole reason for such agreement, aside from mutual convenience, was the belief that each party thereto was either a privilege or mortgage creditor or represented such, that all the privileges and mortgages upon said property were represented, and that without such belief there was no motive for said agreement, and none such would ever have been enterred into.

Defendants especially aver that it was the belief of all parties to said agreement, adjudication, and sale that T. A. Archer held and represented the two notes of Mrs. Murphy now sued on, and that it was on her behalf alone that he became a party to said transactions.

Defendants aver that they had reason to believe and did believe that said T. A. Archer did in reality act as the agent or attorney in fact of Mrs. Murphy; that he acted in the utmost good faith; that he made known to her the steps which were being taken in her favor &
23 behalf; that he frequently advised with her; that she had full knowledge of all that was being done, and freely assented thereto and that she was as fully bound as if she had been personally present

acting for herself, and that if this had not been the belief of defendants no such agreement would ever have been entered into.

Defendants represent that they have discovered that in said act of sale the said T. A. Archer is erroneously made to appear as the liquidator of the firm of Marshall J. Smith & Co., which said firm never had been and was not at the time of said sale either a privilege or mortgage creditor of Paul Cook & Co., and therefore had no direct interest in the said transactions, and could not be a party thereto, and that plaintiff in this suit seeks to take advantage of said error and repudiate the acts of her said agent.

Defendants aver that the two notes of plaintiff herein were or had been in the possession of Marshall J. Smith & Co., or of Marshall J. Smith individually, who had been for a long time, and was at the date of these transactions, the only qualified attorney in fact of Mrs. Murphy.

Defendants represent that they dealt and contracted with said T. A. Archer under the firm conviction that he was the duly authorized agent of the plaintiff in this suit; that otherwise defendants would not have entered into said agreement; and that inasmuch as the said Mrs. 24 Murphy had full knowledge of his acts in the premises, and made no objection thereto, she should be conclusively bound thereby and be decreed to be the owner of her proportionate share of said property.

Defendants represent that if the court shall determine that the said T. A. Archer, in said transactions, was in reality not the duly authorized agent of Mrs. Murphy, and that she is not bound by his acts therein, then there was very great and serious error of fact to their prejudice as to the character or quality in which he was acting; that defendants acted from a mistaken belief as to his real capacity, and are entitled, by reason of said error, to a rescission of said adjudication and sale, or that otherwise they will be made the innocent sufferers of irreparable injury and loss.

Defendants represent that, acting in the belief that all the privilege and mortgage creditors—the plaintiff in this suit as well as others—had been duly represented in said transactions, and were thereby bound and concluded, and pursuant to the agreement above mentioned, they did, for the benefit and advantage of all parties, defray all the costs incident to said proceedings, and have since paid out large sums of money on said property for its proper care and preservation, and for taxes due the city and State, amounting in the aggregate to eleven thousand four hundred & fifty-four $\frac{83}{100}$ dollars ($11,454.83), as follows, to wit:

25 Court costs, att'ys' fees, auctioneer, and notary.....	$3,847 05
Taxes..	3,114 65
Repairs..	768 13
Watchman, 52 months, @ $50 per mo..................	2,600 00
Trustee..	1,125 00
	$11,454 83

And defendants aver that they are entitled to a privilege upon said property and preference over all other creditors for said amount, with interest from the 17th Dec'r, 1873, when said payments were made.

Defendants further aver that they are not the true and legal owners of all said property, but that whilst the title to the same, by agreement, stands in their name, the real owners thereof, in great part, are their coadjudicatees at said public auction, and that they should be called into this suit to defend their interests.

Defendants deny especially that they are in any manner personally bound or responsible to plaintiff in this suit, but that whatever just claim she may be able to establish will attach solely to the property in question or its proceeds, and to these alone can she look for its settlement, and not to these defendants,

Wherefore your respondents pray, the premises considered, that their coadjudicatees, Leeds & Co., composed of C. J. & John Leeds; Logan
& Mackinson, and John Hinnessy and T. A. Archer, be cited to
26 appear, and, after due proceedings, there be judgment recog-
nizing the said T. A. Archer as the agent of plaintiff in said sale,
that she be bound thereby, and that she be recognized as one of the co-owners of said property, in her just proportion, subject to her proportion of the various amounts paid out by respondents on said property for costs, taxes, repairs, and its preservation, or that she have judgment only for her proportionate share of the net proceeds of the sale of said property; or if the court shall determine that the said Archer was not the agent of plaintiff in said transactions, that by reason of said grave error of fact the said sale be rescinded, and the said property be held as it now stands, merely for the purpose of selling it, to the end that the proceeds arising therefrom may be distributed as follows: First, that these defendants be reimbursed the following sums, expended for the benefit of all concerned, as aforesaid, to wit:

Costs, att'ys' fees, auctioneer	$3,847 05
Taxes	3,114 65
Repairs	768 73
Watchman	2,600 00
Trustee	1,125 00
Total	$11,454 83

And, 2d, that the balance therefrom be distributed between the privilege and mortgage creditors, according to their rank, in the same man-
ner and to the same extent as though the property had been reg-
27 ularly sold, by virtue of proper legal proceedings by said parties
against Paul Cook & Co., the original debtors, and that all the
privileges & mortgages be recognized as in full force, power, and effect, and defendants pray for costs, for all necessary orders, and the fullest relief in law and equity.

(Signed) GIBSON & GIBSON,
Att'ys for Def'ts.

Order to file call in warranty of Factors & Traders' Ins'ce Co.

Let this answer and call in warranty be filed and served as herein prayed for, and according to law.

New Orleans, 20th April, 1876.

(Signed) E. NORTH CULLOM, *Judge.*

Service accepted and copy of petition waived.

(Signed) SINGLETON & BROWNE,
For Leeds & Co.

(Signed) BENTRICK EGAN,
For Percy Roberts, assignee, & John Hennessy.

(Signed) G. L. HALL,
For T. A. Archer.

Default on call in warranty of Factors & Traders' Ins'ce Co.—Minutes 19th May, 1876.

WIDOW MARY MURPHY
vs. } No. 7255.
FACTORS' & TRADERS' INS'CE CO. & OTHERS.

On motion of James D. Coleman, of counsel for plaintiff, and on
showing to the court that Leeds & Co., Percy Roberts, assignee
28 of Logan & Mackison, John Hennessy, and T. A. Archer, war-
rantors herein, although duly cited, have failed to answer the
call in warranty in this case—

It is ordered by the court that judgment by default be entered against them.

Answer of Percy Roberts and John Hennessy, warrantors.—Filed 22d May, 1876.

WIDOW MARY MURPHY
vs. } No. 7255.
FACTORS' & TRADERS' INS'CE CO. & OTHERS.

Now comes Percy Roberts, assignee of the late firm of Logan & Mackison, and John Hennessy, called in this cause to defend their interest herein, for answer to the plaintiff's petition plead a general denial to all and singular the allegations therein contained, except in so far as they may be admitted by this answer hereafter.

Respondents admit that proceedings were had in the district court of the United States in the matter of Paul Cook and Justus Vairin, bankrupts, as set forth in plaintiff's petition, and that they, respondents, were creditors of the said bankrupts in the amounts set forth opposite
their respective names, to wit, Logan & Mackison, . ; Percy Rob-
erts, assignee, in the sum of ; John Hennessy, , both
29 for work and materials furnished in fitting up and making re-
pairs to the sugar refinery described in the act referred to in
plaintiff's petition; that their said claims were duly recorded in the office of the recorder of mortgages for the parish of Orleans, all of which will more fully appear from the detailed bills annexed and made part hereof.

Further answering, respondents say that they had by law a lien and privilege upon said sugar refinery and the machinery therein contained superior in rank to the plaintiff and all other creditors of the said Paul Cook and Justus Vairin, that entitled them to be paid the amount of their said claims out of the proceeds of sale of said property, in privilege and preference to the mortgage pretended to be held by the plaintiff herein, as well as all others.

Further answering, respondents say that, pursuant to an agreement of the creditors of the said Paul Cook & Co. & Justus Vairin, and an order of the said district court of the United States in bankruptcy, said sugar refinery was offered for sale at public auction on the 21st of December, 1872, and was adjudicated to Messrs. Leeds & Co., Factors' & Traders' Ins'ce Co., T. A. Archer, acting for and on behalf of the plaintiff herein, and your respondents for the sum of forty-five thousand dollars,
and that for the mutual accommodation of said parties it was agreed
by the said purchasers, without any valuable consideration what-
30 ever, that the title to said property should be taken in the name

of the Factors' & Traders' Ins'ce Co. for their joint account, and that each purchaser should be interested in said purchase to the amount of their respective claims, and should each contribute in the same proportion to pay the costs, expenses, charges, and taxes on said property; and in pursuance of said agreement your respondents did advance and pay the sum set forth opposite their respective names, to wit, Logan & Mackison,   ; John Hennessy,   .

Further answering, respondents say that the parties to whom said property was adjudicated were, or represented themselves to be, all either mortgage or privilege creditors of said property; and in consideration of this circumstance alone they had previously agreed and bound themselves to bid in said property jointly, if it should be necessary, as the only means of protecting their interests, in default of a bid equal to the aggregate amount of their claims, and that the sole reason for such agreement, aside from mutual convenience, was the belief that each party was either a privilege or mortgage creditor, or represented such, and that all the privilege or mortgage creditors upon said property were represented; and without such belief there was no motive for said agreement, and none such would ever have been entered into.

31 Further answering, respondents say that it was the belief of all parties to said agreement, adjudication, and sale that F. A. Archer held and represented the two notes herein claimed to be owned and held by Mrs. Mary Murphy, plaintiff herein, and that it was on her behalf he became a party to said transactions.

Further answering, respondents say that they had reason to believe and did believe that the said T. A. Archer did in reality act as the agent or attorney in fact of the said Mrs. Murphy; that he acted in the utmost good faith; that he made known to her the steps which were being taken in her behalf; that he frequently advised with her; that she had full knowledge of all that was being done and freely assented thereto, and that she was as fully bound as if she had been personally present acting for herself, and that if this had not been the belief of respondents no such agreement would ever have been entered into.

Further answering, respondents say that they have discovered that in the act of sale the said Archer is erroneously made to appear as the liquidator of the firm of Marshall J. Smith & Co., which firm never had been and was not at the time of said sale either a privilege or mortgage creditor of Paul Cook & Co., and therefore had no direct interest in said transactions, and could not be a party thereto, and
32 that plaintiff in this suit seeks to take advantage of said error and repudiate the acts of said agent.

Further answering, respondents say that they and their codefendants dealt and contracted with the said T. A. Archer under the firm conviction and belief that he was the duly authorized agent of the plaintiff in this suit, that otherwise they would not have entered into said agreement, and that inasmuch as the said Mrs. Mary Murphy had full knowledge of his acts in the premises and made no objection thereto, she should be conclusively bound thereby, and be accorded her proportionate share of said property and no more.

Further answering, respondents say that if the court shall determine that the said T. A. Archer in said transactions was in reality not the agent of the said Mrs. Mary Murphy, and that she is not bound by his acts therein, then there was very great and serious error of fact, to the prejudice of your respondents and their codefendants, as to the character and quality in which he was acting, and are entitled by reason of said error to recission of said adjudication and sale; otherwise they will be made the innocent sufferers of irreparable loss and injury.

Wherefore your respondents pray that there be judgment recognizing the said T. A. Archer as the agent of the said Mary Murphy, 33 plaintiff herein, that she be bound by his acts as aforesaid, and recognized as an owner of the property described in her petition to the extent and in the proportion hereinabove stated, subject to her proportion of the costs, taxes, repairs, &c.; and if the court shall determine that the said Archer was not the agent of the said Mrs. Mary Murphy, plaintiff herein, in said transactions, and had no authority to bind her, then and not otherwise the respondents pray that the said sale be rescinded, and that the property be held as it now stands, merely for the purpose of selling it, to the end that the proceeds arising therefrom may be distributed among the privilege and mortgage creditors thereon, as their several claims stood on the 21st December, 1822, and with the like privilege, after deducting all costs, charges, taxes, and expenses paid by respondents or their codefendants. And respondents pray for general relief.

(Signed) BENTWICK EGAN,
Att'y for Percy Roberts, Assignee, & John Hennessy.

Order setting aside default against Percy Roberts & John Hennessy.—Minutes 22d May, 1876.

WIDOW MARY MURPHY
vs.
FACTORS' & TRADERS' INS'CE CO. & OTHERS. } No. 7255.

On motion of B. Egan, of counsel for Percy Roberts, assignee, and John Hennessy, warrantors herein, and on filing their answers—

34 It is ordered by the court that the judgment by default entered against them herein be set aside.

Note of evidence & testimony.—Filed 29th May, 1876.

WIDOW MARY MURPHY
vs.
FACTORS' & TRADERS' INS'CE CO. & OTHERS. } No. 7255.

Plaintiff offers in evidence two mortgage notes (copied on pages 14 to 15); the act of mortgage and the certificate of registry in the office of the recorder of mortgages attached to said act of mortgage, marked C, copied on pages 6 to 14; also an act of sale of real estate, described in the mortgage by the estate of Paul Cook & Co., bankrupts, to the Factors' & Traders' Ins'e Co., marked C; certified copies of all the papers and documents annexed to the act of sale just offered in evidence, marked XI.

MARY MURPHY, sworn in her own behalf, says:

I am the plaintiff in this suit, and owner and holder of these mortgage notes. I made a demand for payment of those notes of Marshal, J. Smith, trustee of the creditors, about the 16th February of this year.

Act of sale, marked X, offered in evidence by plaintiff.—Filed 29 *May,* 1876.

WIDOW MARY MURPHY
vs.
FACTORS' & TRADERS' INS'E CO. & OTHERS. } No. 7255.

35 UNITED STATES OF AMERICA,
State of Louisiana, City of New Orleans:

Before me, Pierre Charles Cuvellier, notary public in and for this city and parish of Orleans, duly commissioned and sworn, and in the presence of the witnesses hereinafter named and undersigned, personally came and appeared—

1st. Marshall J. Smith, of this city, herein acting as the trustee in the matter of Paul Cook & Co., bankrupts, as hereinafter more fully set forth.

2d. Charles J. Leeds, of this city, a member of and herein acting for his firm of Leeds & Co., composed of John Leeds and the said Charles J. Leeds.

3d. M. D. Logan, of this city, herein acting for his firm of Logan & Mackison, of this city, composed of himself and James Mackison.

4th. John Hennessy, of this city, acting for himself.

5th. Thomas A. Archer, of this city, herein acting as the liquidator of the late firm of Marshall J. Smith & Co., in this city, composed of the appearer and Marshall J. Smith, said Archer herein acting as such liquidator in virtue of an instrument of agreement between the creditors of said firm of Marshall J. Smith & Co., wherein said Archer is appointed and recognized as such liquidator.

6th. Harmon Doane, president of the Factors' and Traders' Insurance Company, a corporation domiciliated in this city, fully empow-
36 ered for the purposes of this act by a resolution adopted by the board of directors of said company at a meeting held on the seventeenth day of March, 1873, a certified copy of which resolution is hereto annexed and made a part of these presents—

Who severally declared as follows:

Paul Cook and Justus Vairin, junior, both of this city, were associated in the transaction of commercial business in this city under the firm name of Paul Cook & Co.

On the twenty-first of February, 1871, the said Paul Cook & Co. filed their petition in the United States district court, district of Louisiana, sitting at New Orleans, praying to be adjudicated bankrupts upon their own petition, which petition had previously been sworn to and subscribed by them on said day before C. S. Kellogg, register in bankruptcy, and were declared and adjudicated bankrupts upon their said petition by the said C. S. Kellogg, register in bankruptcy aforesaid, on said date, and to whom, in an order rendered by said court on same date, they were referred to have their petition and schedule filed therewith examined as to correctness in form and number, which examination was so made and correctness ascertained and certified to by said register in bankruptcy on the first of March, 1871, who, on same day, issued a warrant in bankruptcy against the estate of
37 said bankrupts, calling for the first meeting of the creditors of said Paul Cook & Co. to prove their debts and choose one or more assignees of the estate.

On the thirtieth of May, 1871, the first meeting of creditors under said warrant, representing over three-fourths of the debts due by said

bankrupts, was held before said register in bankruptcy, proved their debts, and chose no assignee, but adopted a resolution for the appointment of a trustee to act under a committee of the creditors, and that the estate of said bankrupts be wound up and the proceeds distributed among the creditors by said trustee; that Marshall J. Smith be nominated as such trustee, to take, hold, and distribute the said estate; that Carl Kohn, Leeds, Greenleaf, and Harmon Doane be such committee of creditors. It was ordered by said court, sitting in said matter, by order dated June 12th, 1871, and confirmed 20th June, 1871, that the resolutions of said creditors at their meeting of the 30th May, 1871, be adopted, and that Paul Cook & Co., bankrupts, convey, transfer, and deliver all the property specified in their schedule and owned by them at the date of the filing of their said petition to Marshall J. Smith, the trustee nominated in said resolutions, who shall act under the direction of said committee of creditors. Among the assets belonging to the said Paul Cook & Co. and surrendered by them
38 upon their adjudication in bankruptcy was the following-described property, viz:

Fourteen lots of ground, situated in the first district of this city, in the square bounded by Calliope, Pearl, Delord, and Peters streets, designated by the numbers six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, nineteen, twenty, twenty-one, and twenty-two, on a plan made by Louis H. Pilié, surveyor, dated twenty-third December, 1871, a sketch whereof is hereto annexed and made part hereof, according to which said lots measure as follows: Lot No. 6 forms the corner of Calliope and Pearl streets, and measures twenty-nine feet five inches and four lines front on the former, by eighty-four feet five inches and five lines in depth between equal and parallel lines, and front on the latter street. Lots seven to twelve inclusive measure each twenty feet eleven inches front on Pearl street, by ninety-six feet ten inches in depth between parallel lines, and adjoin each other.

Lots thirteen, fourteen, and fifteen adjoin each other and measure, viz: Lot No. thirteen, twenty-one feet front on Pearl street, one hundred and five feet six inches in depth on the line of lot No. twelve, twenty-seven feet five inches on an oblique rear line, thence an angle, and five feet towards Delord street on an oblique line, and thence a depth
39 of eighty-five feet on the line of lot No. fourteen and up to Pearl
street. Lot No. fourteen, twenty-one feet front on Pearl street, twenty-one feet ten inches on an oblique rear line, eighty-five feet deep on the line of lot No. thirteen, and ninety feet six inches deep on the line of lot No. fifteen. Lot No. fifteen, thirty-seven feet two inches front on Pearl street; thence fifty feet three inches on a converging depth line nearest Delord street; thence twenty-nine feet eight inches on an oblique line running towards Delord street; thence a further depth of forty-six feet six inches; thence twenty-eight feet eight inches on a rear line; and thence a depth of ninety feet six inches on the line of lot No. fourteen and up Pearl street. Lot No. nineteen is situated in the rear of lot No. twelve aforesaid, and measures twenty feet eleven inches on the rear line of said lot No. twelve, nine feet in depth on the side nearest Delord street, thirty-six feet six inches on an oblique rear line, and thirty-nine feet four inches in depth on the side towards Calliope street.

Lots numbers twenty, twenty-one, and twenty-two adjoin each other, and lots eleven, ten, and nine in the rear, and measure each twenty-one feet six inches front on Peters street, twenty feet eleven inches

wide in the rear, by the following depths: Lots No. twenty, one hundred and twenty feet four inches three lines on the said line to-
40 wards Delord street, and one hundred and nine feet ten inches,
four lines on the line of lot No. twenty-one; said lot No. twenty-one has the last mentioned depth on the line of lot No. twenty, and one hundred and seven feet four inches and five lines on the line of lot No. twenty-two, and said lot No. twenty-two has the last depth on the line of lot No. twenty-one, and one hundred and four feet ten inches on the side line towards Calliope street.

Together with all and singular the buildings and improvements thereon, known and designated as the "Orleans Sugar Refinery," with the boilers, machinery, and apparatus used and employed by the said firm of Paul Cook & Co., and the measurement of which above described lots of ground and their distribution are given in conformity with a plan made by Louis H. Pilié, surveyor, on the twenty-third day of December, 1871, in the possession of W. J. Hodgson, auctioneer, by whom a sketch therefrom has been made and certified, and is hereto annexed and made part hereof.

By indenture made and executed at New Orleans, on the thirtieth day of May, 1871, between the said Paul Cook & Co. and Marshall J. Smith, on behalf and with the consent of the creditors of the said Paul Cook & Co., the former, in obedience to the order of said court, dated June 12th, 1871, hereinbefore recited, did convey, transfer, and
41 deliver unto the said Marshall J. Smith, on the aforesaid behalf, all
the estate and effects of said Paul Cook & Co., in which said indenture was acknowledged on the same day before C. S. Kellogg, register in bankruptcy, as the whole will more fully appear by reference to a certified copy of said indenture hereto annexed and made part hereof.

All of which aforesaid proceedings were had in the matter of said Paul Cook & Co. in the district court of the United States for the district of Louisiana, entitled "In the matter of Paul Cook and Justus Vairin, jr., individually and as members of the firm of Paul Cook & Co., No. 1113 in bankruptcy," agreeably with an order issued by said court in said matter on the first of December, 1871; and after the legal advertisements had been made, the above-described real estate, with the buildings, improvements, machinery, &c., was offered for sale at public auction on the twenty-first of December last, 1872, by Washington Irving Hodgson, a duly-licensed auctioneer in this city, on terms of one-third cash and the balance in equal payments of one and two years, with interest from day of sale until final payment at eight per cent. per annum, the act of sale to contain the clause of five per cent. lawyer's fees in case of suit for the credit portion at maturity, with mortgage and vendor's lien on the property, the clause of non-alienando, and the usual stipulation of transfer and delivery of the policies of insurance as collateral security for the payment of the said credit portion, &c.

42 At said sale at public auction the said property was adjudicated on the aforesaid terms and conditions to the Factors' & Traders' Insurance Company, Messrs. Leeds & Co., Lagan & Mackison, John Hennessy, and T. A. Archer, liquidator of Marshall J. Smith & Co., for the price and sum of forty-five thousand dollars. The whole is set forth in the process verbal of said auctioneer, also hereto annexed and made part hereof.

The Factors' & Traders' Insurance Company, one of the adjudicatees aforesaid, has proposed to its coadjudicatees at said sale to take the title to the entire property in its own name, which has been assented to by the latter.

Wherefore the said Messrs. Leeds & Co., Logan & Mackison, John Hennessy, and T. A. Archer, liquidator of Marshall J. Smith & Co., severally present and represented as aforesaid, declared that they do hereby waive, renounce, and abandon unto and in favor of the said Factors' & Traders' Insurance Company, its successors and assigns, any and all rights, title, interest, ownership, claim, and demand that they, the said Leeds & Co., Lagan & Mackison, John Hennessy, and T. A. Archer, liquidator, &c., may have acquired in and to the said property and appurtenances, or any part thereof, in virtue of the adjudication to them as aforesaid.

43 It has also been agreed by and between the said Marshall J. Smith, in his aforesaid capacity of trustee of the property and assets of said Paul Cook & Co., and in behalf and with the consent of the creditors of said firm, and the said Factors' & Traders' Insurance Company, that the terms of said sale at public auction be deviated from, and that the said sale be made entirely for cash.

And now agreeably to the public adjudication aforesaid, and in recognition of the waiver and abandonment of all their rights as adjudicatees by the said Leeds & Co., Logan and Mackison, John Hennessy, and T. A. Archer, liquidator of Marshall J. Smith & Co., aforesaid.

The said Marshall J. Smith, in his aforesaid capacity of trustee of the property and effects of said firm of said Paul Cook & Co., does hereby grant, bargain, sell, convey, transfer, assign, and set over with no other warranty of title than became vested in him as trustee aforesaid, but with subrogation to any and all rights and actions in warranty of the said Paul Cook & Co. against any former owners or vendors thereof—

All and singular the fourteen lots hereinbefore, fully described, with all and singular the buildings, improvements, and appurtenances, thereon and all the machinery and apparatus thereto belonging or appertaining such as the same existed and were contained on and in said premises at the date of said auction sale, and which property and 44 appurtenances were acquired by said Paul Cook & Co. by purchase from the Tudor Ice Company by an act passed before me, the undersigned notary, on the first day of May, eighteen hundred and sixty-seven, registered in the conveyance office of this city in book 92, folio 431 and of which property no alienation has heretofore been made by said Paul Cook & Co., as shown by the hereto annexed certificate from said conveyance office.

And by reference to the hereto annexed certificate from the office of mortgages for the parish it will appear that the following incumbrances are the only ones recorded in the name of the said Paul Cook & Co. against the herein conveyed property, to wit:

1°. The usual drainage privilege.

2°. Book 88, folio 570. The mortgage they granted in favor of S. L. Moss by act before Theo. Guyol, notary, dated 18th M'ch, 1870, to secure forty thousand dollars, interest and costs.

3°. Book 89, folio 258. The privilege in favor of Leeds & Co. for their bill dated 30 June, 1870, sworn to and subscribed before J. P. Montamat, 3d justice of the peace, on the 6th of July, 1870, for eight thousand six hundred and eighteen $\frac{06}{100}$ dollars, balance of account, &c.

4°. Book 89, folio 264. The privilege in favor of Lagan & Mackison, from their bill, sworn to and subscribed before G. W. Sadler, 1st justice of the peace, on the 8th of July, 1870, for three thousand four hundred and forty-three $\frac{07}{100}$ dollars.

5°. B. M. 13, fo. 730. The general mortgages resulting from
45 three judgments, viz, 4th district court 19th December, 1870, in
favor of Rose Foster & E. T. Merrick, No. 24360, for $2,717.50
dollars, interest and costs.

6°. Another in favor of Chaffraix & Agor (B. M. 13, fo. 777) rendered by 7th district court on 13 February, 1871, No. 7871, for $4,307.69 with interest and costs.

7°. And one in favor of Carl Kohn, rendered by same court (7th district) for $12,458.75, interest and cost (B. M. 13, fo. 777), 13th Feb'y. 1871.

8°. The general mortgage in favor of this State resulting from a judgment rendered by the 3d district court on the 27 April, 1871, No. 13010, for two hundred & seventy-two $\frac{25}{100}$ dollars interest, and costs (B. M. 14, fo. 610).

9°. Two privileges in favor of this State, one for two hundred & seventeen $\frac{50}{100}$ dollars (B. T. 9, fo. 10) for taxes of 1870.

10°. Two other privileges in favor of this State, amounting both to one hundred and twenty doll's interest and costs for State taxes of 1869. (B. 4, fo. 1, B. T. 4, fo. 1.)

11°. Three judgments rendered by the fourth district court on the 27th of March, 1872, in favor of this city, all for six hundred and eighteen $\frac{75}{100}$ dollars, interest and costs (each recorded B. T. 97, Fo. 345).

12°. Four judgments in favor of this city rendered by the fourth district court on the 16th November, 1870, for the total sum of seven hundred & thirty-nine $\frac{37\frac{1}{2}}{100}$ doll's with interest and costs (each recorded in
B. T. 97, fo. 354).
46 13°. Three privileges in favor of this State, one for one hun-
dred and seven $\frac{50}{100}$ dollars, another for three hundred and
twenty-two $\frac{50}{100}$ dollars, and the third for twenty-one $\frac{50}{100}$ dollars, with
interest and costs, each recorded B. T. 98, fo. 17.)

14°. And the general mortgage resulting from a judgment rendered by the eighth district court on the fourth of April, 1872, for ten dollars, interests and costs (B. T. 97, fo. 472).

All of which before recited encumbrances will be disposed of in due course of law.

This sale is made and accepted agreeably to the public adjudication aforesaid, and in accordance with the aforesaid deviation from the terms thereof, for and in consideration of the price of forty-five thousand dollars, which the said Factor's & Trader's Ins'ce Co., through the said Harmon Doane, president thereof, has presently paid in cash in ready money to the said Marshall J. Smith, trustee aforesaid, the receipt whereof he hereby acknowledges and for which he grants acquittance, and which sum is to be retained by the said trustee, subject to such disposition thereof as may be ordered by the aforesaid district court and the creditors of the said Paul Cook & Co.

And the said Charles J. Leeds for the firm of Leeds & Co., the
47 said M. D. Lagan, for the firm of Lagan & Mackison, John Hen-
nessy for himself and T. A. Archer, liquidator of Marshall J.
Smith & Co., do hereby declare that they severally bid for and became adjudicatees of the said property for the purpose and with the intent of conveying the title to the same unto the said Factor's & Trader's Insurance Company as herein done.

And whereas there were certain sums of money advanced by various parties to make a fund for paying costs, charges, and expenses to the assignee preliminary to removing the same from his custody and transferring it into the hands of trustees, and whereas there are other costs, charges, and expenses incurred in administering the same by the trustee:

Now, therefore, the said coadjudicatees hereby authorized and empowered the said Factors' & Traders' Insurance Company to settle the same, hereby declaring that all sums expended by said company for said purposes shall be properly chargeable to the adjudication price of the property herein conveyed.

Thus done and passed in my office, at the said city of New Orleans, in the presence of Martin L. Ainsworth and J. Henry Forcelle, witnesses of lawful age, and domiciliated in this city, who hereunto sign their names together with the said appearers and me, the said notary, on this twentieth day of June, in the year of our Lord one 48
thousand eight hundred and seventy-three.

(Original signed) MARSHALL J. SMITH, *Trustee.*
HARMON DOANE, *President.*
JOHN HENNESSY,
T. A. ARCHER,
LOGAN AND MACKISON.
P. pro LEEDS & CO.,
LEEDS GREENLEAF.
CHARLES J. LEEDS,
For LEEDS & CO.

M. L. AINSWORTH & J. H. FORCELLE.

P. CHAS. CUVILLIER,
Not. Pub.

I, John Bendernagel, custodian of notarial records parish of Orleans, do certify that the foregoing is a true and correct copy of the original act in the records of P. Charles Cuvellier, late notary, now in my custody.

In faith whereof, I hereunto set my hand and seal this twenty-seventh day of May, 1876.

[SEAL.] (Signed) J. BENDERNAGEL,
Custodian of Notarial Records.

Document marked "XI," being certified copy of all papers and documents annexed to act of sale marked X, offered in evidence by plaintiff.—Filed 29th May, 1876.

WIDOW MARY MURPHY
vs.
FACTORS' & TRADERS' INS'CE CO. & OTHERS. } No. 7255.

Paul Cook & Co.—Bankruptcy.—*No.* 1113.

49 Marshall J. Smith, trustee, on an application to confirm sale made under and in virtue of a decree of the hon. the United States district court of Louisiana.

Respectfully showing unto your honor, the said trustee exhibits herewith all the proceedings taken to effect a sale of the property in the accompanying deed, all of which conform to law, and to various orders touching the sale thereof issued from this court.

Wherefore the said trustee, making a copy of said part of this petition, prays this hon. court to confirm and homologate said sales and proceedings.

(Signed) BANDOLPH, SINGLETON & BROWNE.

Let the prayer of this petition be granted and the sale confirmed.
June 21st, 1873.
(Signed) E. H. DUREL, *Judge.*

CLERK'S OFFICE.

A true copy.
New Orleans, June 21st, 1873.
[SEAL.] (Signed) J. A. CHARBONNET, *D'y Clerk.*

At a regular stated meeting of the board of trustees of the Factors' & Traders' Insurance Company, held at their office in the city of New Orleans, La., on the 17th day of March, 1873, it was

Resolved, That Harmon Doane, president of the company, be, and he is hereby, authorized, in the name of the company, to accept the sale of the property belonging to Paul Cook & Co., bankrupts,
50 known as the Orleans sugar refinery, adjudicated to this company and others, at a sale made at public auction by Nash & Hodgson, auctioneers, on the twenty-first day December, 1872, and take and accept the title to the whole property in the name of this company, the other adjudicatees having renounced their rights to the property as such, and consented and agreed that the property be taken directly in the name of this company.

Further, that whereas, by an agreement with the trustee of the property, the terms of sale is to be made for cash, instead of the terms and conditions announced at the time of sale, that the president is authorized to pay the consideration price in cash, as agreed upon.

Resolved, That the president be, and he is hereby, further authorized to sign, in the name of this company, all acts, deeds, or other instruments of writing necessary to complete said sale.

A true extract from the minutes.
New Orleans, June 20th, 1873.
[SEAL.] Attest: ED. A. PALFREY, *Sec'y.*

In the district court of the United States for the district of Louisiana.

IN THE MATTER OF
PAUL COOK & CO., VIZ, PAUL COOK & JUSTUS VAIRIN, BANKRUPTS. } No. 113. In bankruptcy.

51 The foregoing certificate having been filed and read, it is ordered that the said Paul Cook & Co. shall convey, transfer, and deliver all their property or estate to Marshall J. Smith, as trustee, by deed in the following form:

DISTRICT OF LOUISIANA, *ss:*

In the district court of the United States for said district.

This indenture, made this 30th day of May, A. D. 1871, between Paul Cook & Co., of New Orleans, in the parish of Orleans and State of Louisiana, and Marshall J. Smith, on behalf and with consent of creditors of said Paul Cook & Co.—

Witnesseth that the said Paul Cook & Co. hereby conveys, transfers, and delivers all his estate and effects to Marshall J. Smith absolutely, to have and to hold the same in the same manner and with the same rights in all respects as the said Paul Cook & Co. would have had or held the same if no proceedings in bankruptcy had been taken against them, to be applied and administered for the benefit of the creditors of said Paul Cook & Co., in like manner as if said Paul Cook & Co. had been at the date hereof duly adjudged bankrupt, and the said Marshall J. Smith had been appointed assignee in bankruptcy under said act.

52 In testimony whereof the said Paul Cook & Co. and Justus Vairin, jr., and the said Marshall J. Smith, in acceptance of said trust, have hereunto set their hands and seals this 30th day of May, 1871.

(Signed) MARSHALL J. SMITH. [L. S.]
" PAUL COOK. [L. S.]
" JUSTUS VAIRIN, JR. [L. S.]

Execution in presence of—

This day appeared before me, a register in bankruptcy, the above-named Paul Cook & Justus Vairin, jr., and acknowledged the foregoing instrument by them signed to be their free act and deed.

(Signed) C. S. KELLOGG,
Register in Bankruptcy.

We hereby give our assent to the execution of the above deed.

(Signed) C. KOHN.
" CHAFFRAIX & AGAR.
" LOGAN & MACKISON.
" JOHN HENNESSY.
" P. Opro LEEDS & CO.,
LEEDS GREENLEAF.
" McCLOSKEY, RIGLEY & CO.
" J. S. AITKINS & CO.
" OLIVER PERIN.
" E. D. SEGHERS.
" SAM'L JAMISON.
" DAVID STEWART.
" MRS. T. F. BREMMING.
" MARSHALL J. SMITH & CO.,
(*In liquidation.*)
Reserving mortgage privilege:
" HENRY BREMMING.

53 (Signed) FACTORS' & TRADERS' INS'CE CO.,
Reserving Mortgage Privilege,
H. DOANE, *Presd't.*

In the district court of the United States for the district of Louisiana.

IN THE MATTER OF PAUL COOK & CO., VIZ, PAUL COOK AND JUSTUS VAIRIN, BANKRUPTS. } No. 1113. In bankruptcy.

Paul Cook & Co., the said bankrupts, being duly sworn, depose and say that they have conveyed, transferred, and delivered all their property to the trustee in the above indenture named, and that the persons signing their consent to the above conveyance represent three-fourths in value of all the creditors whose claims have been proved against their estate.

(Signed) PAUL COOK,
JUSTUS VAIRIN, Jr.,
Bankrupts.

Subscribed and sworn this 30th day of May, 1871, before me.
(Signed) C. S. KELLOGG,
Register in Bankruptcy.

I hereby certify that the foregoing four pages contain a true and correct copy of the deed from Paul Cook & Co., bankrupts, and the consent of his creditors thereto to Marshall J. Smith, trustee, as the same remains of record and on file in my office.

New Orleans, Feb'y 21st, 1873.
(Signed) C. S. KELLOGG,
Register in Bankruptcy.

54 *Procés verbal.*

Sale made by Nash & Hodgson, auctioneers in the matter of Messrs. Paul Cook & Co., bankrupts.

I, Washington Irving Hodgson, a duly licensed auctioneer in and for the city of New Orleans, parish of Orleans, State of Louisiana, by virtue and in pursuance of an order of the Hon. E. H. Durel, judge of the district court of the United States of America for the district of Louisiana, sitting in bankruptcy, dated New Orleans, December 1st, 1871, docket No. 1113, and after the necessary legal advertisements in the New Orleans Republic, the official journal of the State of Louisiana, on the seventeenth, twenty-third, and thirtieth days of November, 1872, and on the seventh, fourteenth, and twenty-first days of December 1872, did on Saturday, December 21st, 1872, at 12 o'clock, m. at the St. Charles auction exchange, in the basement rotunda of the St. Charles Hotel in this city, adjudicate to the last and highest bidder, the following described property free of all incumbrances, reserving the rights of the privileged creditors to the funds in the trustee's hands, to wit: fourteen lots of ground, together with the buildings & improvements thereon situated in the first district of this city, in the fuabourg Delord, in the square bounded by Delord, New Levee, Pearl, and Calliope
(late Louisa) streets, designated as lots Nos. 6, 7, 8, 9, 10, 11, 12, 13,
55 14, 15, 20, 21, 22, and portion A of lot No. 19. The whole as per
plan made by Louis H. Pilie, surveyor, taken from a sketch made by J. A. D'Hémécourt, deputy city surveyor, dated December, 1871, a true sketch of which is hereto annexed. The improvements consist of that commodious, well-built, and splendid property known as the Orleans Sugar Refinery, and all the buildings thereunto belonging, with thousand ($45,000) dollars on the following terms and conditions: one-third boilers, machinery, &c., to Factors' & Traders' Insurance Company, Messrs. Leeds & Co., Messrs. Lagan & Mackison, John Hennessy, T. A. Archer, liquidator of Marshall J. Smith & Co., for the price and sum of forty-five cash in U. S. Treasury notes, and the balance in equal payments at one and two years (the notes to be divided into coupons if required), with eight

per cent interest per annum from date until paid, with special mortgage and vendor,s privilege, the mortgage to embrace the clause of five per cent. attorney's fees in case of suit, the buildings, improvements, and machinery to be kept fully insured, and the policies to be transferred to the holders of the credit notes.

Act of sale before P. Chas. Cuvellier, not. pub., at the expense of the purchasers, including the stamps & the taxes for the year 1872.

New Orleans, December 21st, 1872.

(Signed) W. I. HODGSON,
Auctioneer.

A true sketch from a plan made by Louis H. Pilie, surveyor, dated December 23d, 1871, taken from a sketch made by J. A. D'Hémicourt, deputy city surveyor, dated December 7, 1871.

(Signed) W. I. HODGSON,
Auctioneer.

MORTGAGE OFFICE.

The undersigned, recorder of mortgages for this parish and city
57 of New Orleans, State of Louisiana, certifies that in the records
of this office, there are no other mortgages standing in the name of Paul Cook & Justus Vairin, jr., composing the firm of Paul Cook & Co., and recorded against the following described property:

Fourteen valuable lots of ground, together with the buildings and improvements thereon, situate in the first district of this city in the faubourg Delord, in the square bounded by Delord, New Levee, Pearl and Calliope (late Louisa) streets, designated as lots Nos. 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 20, 21, 22, and a portion A of lot No. 19, which adjoin each other and measure as follows, to wit: Lot No. 6, measures 29 feet 5 inches 4 lines front on Calliope street, by a depth of 84 feet front on Pearl street, of which two streets it forms the corner, all between parallel lines; lots 7 to 12 inclusive, adjoin each other and lot No. 6 in the rear, and measure each 20 feet 11 inches front on Pearl street by a depth of 96 feet 10 inches, all between parallel lines; lot No. 13 adjoins lot No. 12, and measures 21 feet front on Pearl street, 105 feet 6 inches on the side of lot No. 12 and A; thence 27 feet 5 inches on the rear line running towards Delord street, when it intersects the division line of lot No. 14; thence upon said division line of lot No. 14, 85 feet to Pearl street, the place of starting;

Lot No. 14 adjoins lot No. 13, and measures 21 feet front on Pearl
street, 21 feet 10 inches in width in the rear by a depth of 85 feet
58 on the side line next to lot No. 13, and 90 feet 6 inches on the
other side line next to lot No. 15;

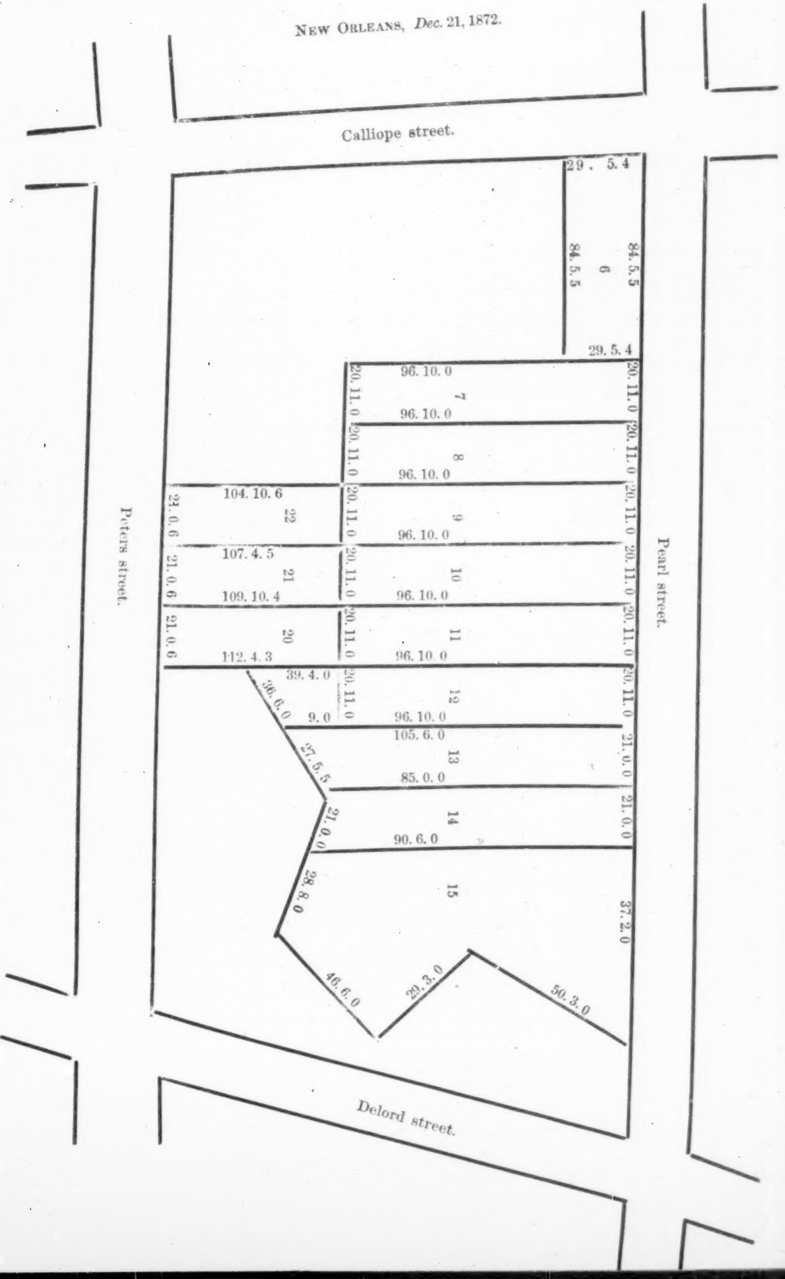
Lot No. 15 adjoins lot No. 14, and measures 37 feet 2 inches front on Pearl street, 90 feet 6 inches on the side next to lot No. 14, 28 feet 8 inches on the rear line running toward Pearl street; thence 46 feet 6 inches on a diagonal line, running towards lot No. 14, and thence on a diverging line 50 feet 3 inches to Pearl street, the place of starting;

Lot No. A is of a triangular shape and is the rear portion of the original lot No. 19, and measures 20 feet 11 inches on the rear of lot No. 12, 39 feet 4 inches on the line of lot No. 20; thence in a diagonal line running toward Pearl street and across the rear of lot No. 19, a distance of 36 feet 6 inches, and 9 feet on the side of lot No. 13;

Lots Nos. 20, 21, and 22, adjoin each other, and lots No. 9, 10, 11, in their rear, and lot No. A on its upper side, and measure together 63 feet 2 inches, 2 lines front on New Levee street; 62 feet 9 inches in their rear by a depth of 112 feet 4 inches 3 lines on the side-line next to lots A and 19, and 104 feet 10 inches 6 lines on the other side-line next to Calliope street, all more or less American measure, measuring in all some 26,000 square feet of area according to a plan made by Louis H. Pilie, surveyor, taken from a sketch made by J. A. D'Heémecourt, deputy surveyor, dated December 7th, 1871;

59 The improvements consist of that commodious, well built, and
splendid property known as the Orleans Sugar Refinery, consisting of one six*th*-story brick building 40 by 100 feet; one two-story brick building 40 by 100 feet; one building 20 by 45 feet for fitters; one two-

NEW ORLEANS, *Dec.* 21, 1872.


Calliope street.
Peters street.
Pearl street.
Delord street.
29. 5. 4
84. 5. 5
6
84. 5. 5
29. 5. 4
96. 10. 0
7
20. 11. 0
96. 10. 0
8
96. 10. 0
104. 10. 6
22
21. 0. 6
9
96. 10. 0
107. 4. 5
21
21. 0. 6
109. 10. 4
10
96. 10. 0
20
21. 0. 6
112. 4. 3
11
96. 10. 0
39. 4. 0
36. 6. 0
9. 0
12
96. 10. 0
105. 6. 0
13
27. 5. 5
85. 0. 0
21. 0. 0
14
21. 0. 0
90. 6. 0
15
28. 8. 0
37. 2. 0
46. 6. 0
29. 3. 0
50. 3. 0

story shed 24 by 60 feet; one one-story shed 66 by 110 feet, with boilers, machinery—

Than the following, to wit:

B. P. 1, fo. 370; B. M. 13, fo. 379; B. M. 14, fo. 283—the draining privilege;

B. 88, fo. 570; the mortgage granted to them per act before Theo. Guyol, notary, dated 18th March, 1870, in favor of Samuel L. Moss (on 14 lots of ground, No. 6 to 15 inclusive, and 19 to 22 inclusive), to secure $40,000.00 with interest and costs, &c.;

B. 89, fo. 258; the privilege in favor of Leeds & Co. resulting from a bill dated 20th June, 1870, sworn & subscribed to before John P. Montamat, 3d justice of the peace, on the 6th July, 1870, for $8,618.00 balance due vs. Paul Cook & Co.;

B. 89, fo. 264; the privilege in favor of Logan & Mackison, resulting from a bill sworn to and subscribed before Geo. W. Sadler, 1st justice of the peace, on the 8th July, 1860, for $3,443.17 vs. Paul Cook & Co.;

B. M. 13, fo. 730; the general one resulting from judgments vs. Cook & Vairin in solido, resulting from three judgments, rendered, one by 4th district court on 19th December, 1870, in favor of Ran, Foster, & E. T. Merrick (No. 24360), for $2,717.75 with interests,
60 costs, &c.;

B. M, fo. 777; another in favor of Chaffraix & Agar, rendered by 7th district court, 13th February, 1871, (No. 7871), for $4,307.69 with interest, cost, &c.;

B. M. 13, fo. 771; and one in favor of Carl Kohn, rendered by same court same day, 13' February, 1871, (No. 7881), for $12,458.75, interest, costs, &c.;

B. M. 14, fo. 61; the general one in favor of this State, resulting from a judgment rendered by 3d district court on 27th April, 1871, (No. 13910), for $272.25, interest, costs, &c. vs. Paul Cook & Co.;

B. T. 9, fo. 10; B. T. 9, fo. 10; two privileges in favor of this State; one for $217.50, and the other for $14.50 for State taxes of 1870 vs. Cook & Vairin;

B. T. 4, fo. 1; two other privileges in favor of this State, amounting both to $120.00, int., costs, for State taxes of 1869, vs. The Same;

B. T. 97, fo. 345; B. T. 97, fo. 345; B. T. 397, fo. 345; three judgments rendered by the 4th district court on the 27th March, 1872, in favor of this city, all for $618.75, int., costs, &c., vs. the said Paul Cook & Co.;

B. T. 97, fo. 354; B. T. 97, fo. 354; B. T. 97, fo. 354; B. T. 97, fo. 354; four judgments in favor of this city rendered by the 4th district court on the 16' November, 1870, for the total sum of $739.37½ with interest, costs, &c., vs. said Paul Cook & Co.;

B. T. 98, fo. 17; B. T. 98, fo. 17; B. T. 98, fo. 17; and three privileges in favor of this State for $107.50, another for $322.50, and the third one for $21.50 with int., cost', vs. P. Cook & Co.;

61 B. T. 97, fo. 472; and the general one, resulting from a judgment rendered by 8th district court on 4th April, 1872, for $10.00, int., &c., vs. J. Vairin.

New Orleans, January 14th, 1873.

[SEAL.] (Signed) C. DARCANTEL, *D'y.*

STATE OF LOUISIANA,
Parish of Orleans:

OFFICE OF THE REGISTER OF CONVEYANCES,
New Orleans, 13th January, 1873.

The undersigned register of conveyances in and for the parish of Orleans, State of Louisiana, hereby certifies that according to the records of this office it does not appear that Messrs. Paul Cook & Justus Vairin have alienated the following property, to wit:

Fourteen valuable lots of ground, together with the buildings and improvements thereon, situated in the first district of this city, in the faubourg Delord, in the square bounded by Delord, New Levee, Pearl, and Calliope (late Louisiana) streets, designated as lots Nos. 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 20, 21, 22, and portion A of lot No. 19, which adjoin each other and measure as follows, to wit:

Lot No. 6 measures 29 feet 5 inches 4 lines front on Calliope street by a depth and front on Pearl street of 84 feet 5 inches 5 lines, of which two streets it forms the corner, all between parallel lines.

Lots No. 7 to 12, inclusive, adjoin each other, and lot No. 6 in
62 its rear, and measure each 20 feet 11 inches front on Pearl
street by a depth of 96 feet 10 inches, all between parallel lines.

Lot No. 13 adjoins No. 12, and measures 21 feet front on Pearl street, 105 feet 6 inches on the side of lot No. 12 and A; thence 27 feet 5 inches on the rear line running toward Pearl street; thence 5 feet, running towards Delord street, when it intersects the division line of lot No. 14; thence, upon said division line of lot No. 14, 85 feet to Pearl street, the place of starting.

Lot No. 14 adjoins lot No. 13, and measures 21 feet front on Pearl street, 21 feet 10 inches in width in the rear, by a depth of 85 feet on the said line next to lot No. 13, and 90 feet 6 inches on the other side line next to lot No. 15.

Lot No. 15 adjoins lot No. 14, and measures 37 feet 2 inches front on Pearl street, 90 feet 6 inches on the side next to lot No. 14, 28 feet 8 inches on the rear line running towards Delord street; thence 46 feet 6 inches on a diagonal line running towards Pearl street; thence 29 feet 8 inches on a diagonal line running towards lot No. 14; and thence on a diagonal line 50 feet 3 inches to Pearl street, the place of starting.

Lot No. A is of a triangular shape, and is the rear portion of the original lot No. 19, and measures 20 feet 11 inches on the rear of lot No.
12, 39 feet 4 inches on the line of lot No. 20; thence on a diagonal
63 line running toward Pearl street and across the rear of lot No.
19 a distance of 36 feet 6 inches, and 9 feet on the side of lot No. 13.

Lots Nos. 20, 21 and 22, adjoin each other, and lots No. 9, 10, and 11 in their rear and lot No. A on its upper side, and measure together 63 feet 2 inches 2 lines front on New Levee street, 62 feet 9 inches in their rear, by a depth of 112 feet 4 inches 3 lines on the side line next to lots No. A and 19, and 104 feet 10 inches 6 lines on the other side line next to Calliope street, all more or less American measure, measuring in all some 26,000 square feet of area according to a plan made by Louis H. Pilié, surveyor, taken from a sketch made by J. A. D'Hémécourt, deputy city surveyor, dated December 7th, 1871.

The improvements consist of that commodious, well-built, and splendid property known as the Orleans Sugar Refinery, consisting of one six-story brick building, 40 by 100 feet; one two-story brick building, 40 by 100 feet; one building, 20 by 45 feet, from fitters; one two-story shed, 24 by 60 feet; one one-story shed, 66 by 110 feet, with boilers, machinery.

Acquired the 1st May, 1867.

Registered in book 92, folio 431.

[SEAL.] (Original signed) C. B. FISH, *D'y R.*

I, John Benderuagel, custodian of notarial records, parish of Orleans, do certify that the foregoing eighteen pages and the above
64 portion of this contain true and correct copies of all the documents annexed to and made part of an act of sale by the estate of Paul Cook & Co., bankrupts to the Factors' & Traders' Insurance Company and others, passed before P. C. Cuvellier, late notary, on the 20 day of June, 1873, now in my custody.

In faith whereof I hereunto set my hand and seal this 27th day of May, 1876.

[SEAL.] (Signed) J. BENDERUAGEL,
Custodian of Notarial Records.

Judgment against Factors' & Traders' Ins'ce Co., and maintaining exception of E. E. Norton.—Minutes 29th May, 1876.

WIDOW MARY MURPHY
vs. No. 7255.
FACTORS' & TRADERS' INS'CE CO. & ALS.

This cause came on this day for trial Jas. D. Colman, attorney for pl'ff; Rouse & Grant, att'ys for defendant; E. E. Norton, assignee.

Defendant Factors' & Traders' Insurance Company absent and not represented.

The exception herein filed by E. E. Norton, assignee, being submitted, it is ordered the same be maintained, and plaintiff's suit as against said E. E. Norton, assignee, dismissed.

When, after hearing pleadings, evidence, and counsel, the court, considering the law and the evidence to be in favor of plaintiff, Widow Mary Murphy, and against defendant the Factors' & Traders' Insurance Company—

65 It is ordered, adjudged, and decreed that there be judgment in favor of said plaintiff, Mrs. Mary Murphy, for the sum of twenty thousand dollars, with eight per cent. interest per annum, from the 21st day of March, 1871, until paid, 5% attorney's fees on the amount herein sued upon, and al lcosts of suit, with special mortgage on the following described property, viz:

Fourteen lots of ground situate in the first district of this city, in the square bounded by Pearl, Louisa, New Levee, and Delord streets, and designated as lots Nos. six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, nineteen, twenty, twenty-one, and twenty-two, on a plan made by C. F. Zimpel, on the 10 day of March, 1835, deposited in the office of W. Y. Lewis, late a notary public in this city. Lots Nos. seven, eight and nine measure each twenty feet eleven inches front on Pearl street, by ninety-six feet eight inches in depth. Lots Nos. ten, eleven, & twelve measure each 20 feet 11 inches front on Pearl street, by ninety-six feet 11 inches in depth. Lot No. 13 measures 21 feet front on Pearl street, by 105 feet 8 inches in depth, on the division line of lots No. 12 and 19, thence on the rear line running towards Pearl street 28 feet, when it forms a point, thence from said point towards Delord street about five feet until it intersects the divsi-
66 ion line of lot No. 14, thence on said division line about 85 feet to the place of beginning. Lot No. 19 measures 20 feet 11 inches front on the rear division line of lot No. 12, about forty feet on the division line of lot No. 20, about 36 feet on the division line of property formerly belonging to S. J. Peters, and about nine feet on the line of lot No. 13. Lot No. 14 having 21 feet front on Pearl street, by 85 feet in

depth on one side and 20 feet in width in the rear. Lot No. 15 having 36 feet front on Pearl street, about 90 feet on the line of lot No. 14, thence on the rear line towards Delord street about 29 feet, thence on a line towards Pearl street about 46 feet, thence on a line parallel with the rear line 29 feet 8 inches, thence to the place of beginning 50 feet 6 inches. Lot No. 6 measures 29 feet 5 inches and five lines front on Louisa street by 84 feet 5 inches and 5 lines in depth and front on Pearl street, and lots No. 20, 21, and 22 adjoin each other and measure together 63 feet 1 inch and 6 lines front on New Levee street, 62 feet 9 inches in width in the rear, 112 feet 4 inches and 3 lines in depth on the division line of lot No. 19, and 104 feet 10 inches and 4 lines on the division line of lot No. 19, and 104 feet 10 inches and 4 lines on the division line of lot No. 23, together with all the buildings and improvements on said lots of ground known as the Orleans Refinery, and all the machinery, engines, and appurtenances thereunto belonging.

67 It is further ordered, adjudged, and decreed that the mortgage on said afore-described property, to the extent of the interest which the said Factors' & Traders' Insurance Company may have had, by virtue of its ownership of the two notes of the same series of those held and owned by plaintiff and herein sued upon, is extinguished by confession, that plaintiff's mortgage on said above-described property to secure said debt due her with interest, attorney's fees, and costs be recognized and enforced, and is hereby declared to have full force and effect on said afore-described property. That the Factors' & Traders' Ins'ce Co. be decreed and condemned to pay to the said plaintiff, Widow Mary Murphy, the sum of twenty thousand dollars, with 8 % per annum interest thereon from March 21st, 1871, until paid, 5 % attorney's, fees on the amount sued upon, and costs, or deliver up the said afore-described property to be sold to satisfy said debt, interest, attorney's fees, and costs.

It is further ordered, adjudged, and decreed that the claims and demands herein made and set up by said defendant the Factors' & Traders' Ins'ce Company in the answer herein filed be rejected and dismissed.

Judgment against Marshall J. Smith, trustee.—Minutes, 29th May, 1876

68 WIDOW MARY MURPHY
vs. } No. 7255.
FACTORS' & TRADERS' INS'CE CO. & ALS.

This cause came on this day for trial. James D. Coleman, attorney for plaintiff; defendant Marshall J. Smith, trustee, absent and not represented.

When after hearing the pleadings, evidence, and counsel, the court considering the law and the evidence to be in favor of plaintiff and against Marshall J. Smith, trustee of the creditors of Paul Cook & Co., and Paul Cook and Justus Vairin, jr., bankrupts—

It is ordered, adjudged, and decreed that the judgment by default herein entered against said Marshall J. Smith, trustee, on the 31st March, 1876, be now confirmed and made final, and that plaintiff, Widow Mary Murphy, have judgment in her favor and against Marshall J. Smith, trustee of the creditors of Paul Cook & Co. and Paul Cook and Justus Vairin, jr., bankrupts, for the sum of twenty thousand dollars, with 8 % interest per annum from March 21st, 1871, 5 % attorney's fees, and costs of suit, with special mortgage on the property fully described in the act of mortgage herein filed as part of plaintiff's petition.

That the said Marshall J. Smith, trustee, be decreed and con-
69 demned to pay the said debt, interest, attorney's fees, and costs, or deliver up the said property specially mortgaged to plaintiff herein to secure the said debt due her, with interest, attorney's fees, and costs, to be sold to pay the said debt, interest, attorney's fees, and costs.

Order setting aside judgment, &c.—Minutes, 1st June, 1876.

WIDOW MARY MURPHY
vs.
FACTORS' & TRADERS' INS'CE CO. & ALS. } No. 7255.

On motion of G. L. Hall, of counsel for one of the defendants herein, and upon showing to the court that he is counsel of record herein, and that since then this case has been fixed, posted, and tried without posting his name as of counsel as required by law, and also that this case has been improperly fixed, and that exceptions are pending not waived or tried—

It is ordered that the judgment entered herein on May 29th, 1876, by this honorable court be set aside and opened as to all parties, and the case be reassigned for trial.

Order setting aside default as to T. A. Archer and Leeds & Co., warrantors.—Minutes, 5th June, 1876.

70 WIDOW MARY MURPHY
vs.
FACTORS' & TRADERS' INS'CE CO. & ALS. } No. 7255.

On motion of counsel for T. A. Archer and Leeds & Co., warrantors herein, and on filing their answer—

It is ordered by the court that the judgment by default entered against them on the call in warranty herein be set aside.

Answer of Leeds & Co., warrantors.—Filed 5th June, 1876.

WIDOW MARY MURPHY
vs.
FACTORS' & TRADERS' INS'CE. CO. & ALS. } No. 7255.

Fifth district court, for the parish of Orleans.

Now come into court Leeds & Co., made a party to the above-entitled suit, in pursuance to the demand of the above-named defendants, viz, the Factors' & Traders' Insurance Company, and for answer deny all and singular the allegations contained in plaintiff's petition not hereinafter specially admitted.

These defendants, for further answer, show that the answer of the Factors' & Traders' Ins'ce Co. contain a clear, full, and correct statement of the facts of the case, and the same ought to be recognized and enforced by the judgment of this honorable court.

71 But should this honorable court, on due and full investigation of this cause upon the evidence that may be adduced on the trial thereof, hold that plaintiff was not bound by the acts and designs of Thomas A. Archer, and in consequence thereof that plaintiff is not, in

fact, a co-owner of the property referred to in her petition, then these defendants show that they were privileged creditors of the said Paul Cook & Co., to the amount of fourteen thousand one hundred and eighteen $\frac{06}{100}$ dollars, subject to a credit of five thousand five hundred dollars, leaving a balance of eight thousand and six hundred & eighteen $\frac{06}{100}$ dollars still, and owing for altering vacuum-pan, repairing and altering boilers, making breeching, chimneys and erecting do., labor of mechanics at refinery, 2 centrifugals with addition to same, pulleys, hangers, shaftings, boxes, bearings for do., iron frames for windows, washers, plates, bolts, wheels, pipes and fittings for do., boiler-iron, rivets, flanges, and brass work, and repairing machinery generally, as will more fully appear by a bill thereof to be filed and made part of this petition.

That said indebtedness was duly acknowledged and admitted to be true and correct by said Paul Cook & Co. as soon as the work was done and the cost thereof ascertained, and said account was duly recorded in the office of the recorder of mortgages in this city and parish.

72 That the above-named work, repairs, &c., made upon the sugar and molasses refinery contained in the premises described in plaintiff's petition was absolutely necessary, and without the same the said refinery could not have been worked, and that the value thereof was increased to the amount of the sum due these defendants, as above stated.

Now, these defendants adopt the answer of the Factors' & Traders' Insurance Company in the same manner and to the same extent as though the same was contained in this answer; and they pray that the same may be enforced as therein prayed for; and these defendants pray for all general further and equitable relief that may, in the premises, be granted.

(Signed) SINGLETON & BROWNE,
Att'ys for Leeds & Co.

Answer of T. A. Archer.—Warrantor.—Filed 5th June, 1876.

WIDOW MARY MURPHY
vs. No. 7255.
FACTORS' & TRADERS' INS'CE CO. & ALS.

Fifth district court, for the parish of Orleans.

Now, into court, by his undersigned counsel, comes T. A. Archer, made defendant and herein called in warranty, and for answer denies
all and singular the allegations of plaintiff's petition, save such
73 as may be hereinafter admitted; and further answering avers
that in all the transactions alleged to have taken place as mentioned in plaintiff's petition and other defendants' answer, wherein your respondent's name is used either in an individual or representative capacity, your respondent acted solely as the agent of said Mrs. Mary Murphy, either expressly or impliedly authorized by her so to act; and respondent further avers that he had no individual interest whatever in said contract, agreement, or transaction alleged to have taken place as mentioned in plaintiff's petition, or the defendants the Factors' and Traders' Insurance Company's answer; and this defendant prays to be hence dismissed with costs.

(Signed) G. L. HALL,
Att'y for T. A. Archer.

Answer of Marshall J. Smith, trustee.—Filed June 12th, 1876.

WIDOW MARY MURPHY
vs.
FACTORS' & TRADERS' INS'CE CO. & ALS. } No. 7255.

And now comes one of the defendants, Marshall J. Smith, trustee, and for answer to plaintiff's demand adopts the answer of the Factors' & Traders' Ins'ce Co. herein filed, and begs leave to have the same considered as his answer as far as all the material facts are concerned.

74 And, further answering, said Marshall J. Smith, trustee, says he was acting in an official capacity, and under and in obedience to the orders of the bankrupt court of the United States for the district of Louisiana, and is only responsible for malfeasance or non-feasance in his said trust, which is not alleged, and defendant is not liable to plaintiff in any manner or for any sum whatever.

Therefore he prays to be dismissed hence with costs, and for general relief.

(Signed) SINGLETON & BROWNE,
Att'ys for Marshall J. Smith, Trustee.

Testimony.—Filed 12th June, 1876.

WIDOW MARY MURPHY
vs.
FACTORS' & TRADERS' INS'CE CO. & ALS. } No. 7255.

Testimony taken in open court, June 12, 1876.

Plaintiff offers in evidence the two notes sued on, marked A & B. (Copied on pages 16 to 18.)

Act of sale before P. C. Cuvellier, notary public (of the property mortgaged), to the Factors' & Traders' Insurance Company by the estate of Paul Cook & Co., bankrupts, dated 20th June, 1873. (Copied on pages 42 to 60.)

75 Certified copies of all documents and papers annexed to said act of sale and made part thereof, marked X and XI. (Copied on pages 60 to 80.)

The note of evidence taken on 29th May, 1876, and also the evidence of Mrs. Murphy, the plaintiff, taken on the same day, 29th May, 1876. (Copied on pages 42 to 43.)

Counsel for defendant having called Mr. Thos. A. Archer as a witness—

Counsel for plaintiff objects to the introduction of any parole proof in support of the allegations in defendant's answer, on the grounds:

1°. That the defendant The Factors' & Traders' Insurance Co., by virtue of the authentic act of sale offered in evidence by plaintiff, are the sole owners of the mortgage property.

2°. That the defendant purchased this property from the debtor subject to the plaintiff's mortgage, which contains the non-alienation clause, and cannot, therefore, claim to be in any better position than the mortgage debtor, nor plead any exception, nor urge any defence the said debtor could not.

3°. That, in the contemplation of the law, this property is in possession of the mortgage debtor, and the defendant, having purchased it, has not greater nor less rights than a debtor from whom he purchased the property, incumbered with a mortgage containing the pac de non alienendo.

4°. That the defendant cannot prove as to the plaintiff (a third person) any act or circumstances beyond the authentic act of sale offered in evidence to which the defendant is a party. 76

5°. That the defendant cannot in an action to enforce a mortgage allege or prove any fact going to show error on a contract of sale by which he became possessed of the mortgage containing the pac de non alienendo; he cannot in a collateral manner seek to make null or rescind a contract of sale, but must resort to an action in which all parties to the contract of sale must be made parties to the action of re'cission. The defendant in this instance has not made the vendor a party in its answer.

Plaintiff objects to any proof being made by Leeds & Co., Lagan & Mackison, John Hennessy, T. A. Archer, liquidator of Marshall J. Smith & Co., Marshall J. Smith, trustee, on the ground that they are without interest in this suit, since by their own admission and the evidence before the court they were adjudicatees of this property, and they renounced and relinquished all their rights to the property, and subrogated the Factors' and Traders' Ins'ce Co. to their said rights, and they are estopped by their said act from asserting any real rights upon the property.

Objections sustained; defendants except.)

THOS. A. ARCHER sworn for defendants.

77 Defendants propose to prove by Thos. A. Archer that at the time of the sale described in plaintiff's petition, as also in the defendants' answers, that he was the agent of Mrs. Mary Murphy, the plaintiff herein; that in the purchase of the property, and in everything that was done concerning it, he acted with the full knowledge and approbation of Mrs. Mary Murphy, the plaintiff herein; that she was aware of the purpose to purchase it in for the creditors at the bankrupt sale; that she assented to it; that after it was done she was apprised of the fact and consented to it, and ratified every act over and over again; she had conferences with Mr. Thos. A. Archer, as her agent and attorney in fact, in this matter; that she was kept advised throughout the whole of every step that was taken, and ratified and approved the same by her assent; also that he acted in no other capacity; that the description contained in the act as acting as liquidator of the firm of Marshall J. Smith & Co. was incorrect; that it was an improper description and erroneous; and that he acted solely therein as the representative of the interests of Mrs. Mary Murphy, the plaintiff, and that Marshall J. Smith & Co. had no claim whatever, privilege, or mortgage against Paul Cook & Co. on the property sold, and that it was well known to Mrs. Murphy the interest that she had in this sale, and she approved it.

78 (Objected to, on the ground that this is an effort to prove an agency to sell immovable property by parole, and to contradict a written act of sale offered in evidence which has been passed upon by the court.

The court rules that the objections are well taken as to all that transpired before and at the time of the passing of the act, and well taken as to the insufficiency as to the evidence of agency on the part of Mr. Archer, it not being in writing and so professed; the court interposes no authoritative objection to the introduction of evidence to show that after the passage of the act Mrs. Murphy, with a full knowledge of the contents of the act, gave her assent.)

Q. Mr. Archer, you had the notes in your possession at the time of the sale?

A. At the time of the sale I had the notes in my possession.

Q. These identical notes sued on here?

A. Yes; but they were placed by me in a bank-box belonging to Mrs. Murphy, but in my possession; those are the two notes that were in my possession but placed in Mrs. Murphy's bank-box.

Q. Had you the key to the bank-box?

A. Yes, sir; I had one key and she had the other.

Q. Do I understand you to say that Mrs. Murphy subsequently, after
this sale, had interviews with you, and that you explained to her
79 what had been done, and she ratified the same?

A. I had several conversations before and after.

Q. Did you have any subsequent to the sale?

A. Yes, sir; afterwards I saw her, in '73, two or three times, and may be four times; she came to my office with her son, and talked to me about it.

Q. And she approved and ratified what had been done?

A. Well, she made no objection; she came to see how the matter was progressing, and she wanted to know everything about it; I was merely acting as a friend in the matter, and I believed I was doing the best for her interest in every sense of the word.

Q. Did she ever say anything or do anything that indicated that she repudiated anything that you had done?

A. Never, until Mr. Coleman told me so, since he has charge of this case.

(Counsel for plaintiff objects to proving ratification by parole. Objection overruled; plaintiff excepts.)

Q. Then, as to the explanation of this sale and act, what did you do after it was done in this relation of Mrs. Murphy; what explanation, if any, did you make?

A. Well, I told her, as near as I could, everything that had transpired in regard to the property.

Q. Did she know who bought in the property?

80 A. Yes, sir; I bought it myself, as the one representing the mortgage creditors and privilege creditors. They had a meeting and arranged among themselves to buy that property up to a certain amount of money, $50,000, and it was bid in for them by me at $45,000, and I was was representing Mrs. Murphy; at least that was my belief at time.

Q. Afterwards did she understand the matter fully?

A. Well, I told her at the time, but it has been several years ago, and I don't remember the exact conversations I had with her, or what reply she made; I am certain, however, I informed her of the nature of the proceedings several times.

Q. And the sale of property?

A. Yes, sir.

Q. And that she was represented?

A. Well, I informed her that I was looking after her interest in the matter; I never read her the act or showed it to her.

Q. Did you explain to her what interest was secured to her?

A. Yes, sir; I did; I told her that she would have her pro rata with other mortgage and privilege creditors.

Q. What was her reply?

A. She made no reply; she gave her tacit consent, but as I tell you it is some years ago, and I don't remember the conversation
81 that may have occurred, but I know that Mr. Murphy frequently talked to me about the matter; we had a great many talks about it.

Q. Did she express herself satisfied with that act of sale?

A. Well, she never expressed herself as being displeased or pleased; she expressed herself as wishing to see the matter settled; and she was anxious to get what money belonged to her out of it.

Q. Could she have read that act of sale if it had been presented to her?

A. My impression is that she could not.

Q. Do you know whether or not she can read?

A. I do not.

Q. Have you ever had occasion to ascertain whether or not she could have read the act of sale?

A. Well, sir; my impression is that she does not read nor write, but I am not certain about it.

Q. From what did you derive that impression?

A. Well, I have never seen her sign her name or read an instrument of writing; I have known her before the war and since the war.

Q. You had transactions with her during all this time?

A. Well, sir, not until the death of her husband; I never have been intimately connected with her in business transactions.

82 Q. Have you ever represented Mrs. Murphy in any other business transactions except in this matter?

(Objected to as irrelevant. Objection sustained.)

By Mr. EGAN:

Q. Were you present at the meeting of the creditors of Paul Cook & Co. that took place in the office of the Factors' & Traders' Ins'e Co. before the sale?

A. I was; I recollect you were there, too.

Q. Do you recollect who were there; enumerate the creditors who were there?

A. Mr. Harmon Doane, Leeds Greenleaf, of Leeds & Co., Mr. Lagan, or one of the firm of Lagan & Mackison—I think it was Mr. Lagan—and myself.

Q. What was the object of that meeting?

A. The object of that meeting was to arrange in regard to the purchase of the property by the trustee.

Q. Purchase of what property; the property described in that act of sale?

A. Yes; described in that act of sale, marked D.

(Mr. Egan offers in evidence act of sale, marked D.)

Q. Mr. Archer, who did those various parties represent in this transaction, the parties you have just now named?

A. Mr. Harmon Doane; represented the Factors' & Traders' Ins'ce Co.; he was the president, Mr. Leeds Greenleaf, the firm of Leeds
83 & Co., Mr. Lagan, the firm of Lagan & Mackison; (and Thos. A. Archer represented Mrs. Mary Murphy.

(Objected to, on the ground that it is an attempt to prove an agency concerning real estate by parole.

Objection sustained, on the ground that if the parties desire to bind Mrs. Murphy on account of the agency of Mr. Archer, in any matter relating to real estate or title thereto, the agency must be in writing in any matter affecting the title of real estate.

Defendant excepts.)

Q. Will you state what took place at the meeting you have referred to?

A. There was an agreement entered into by the Orleans Refinery.

(Objected to, on the ground that it is res inter alios acta. Objection sustained. Defendants except.)

Q. You say that it is your impression, from your long acquaintance with Mrs. Murphy, that she does not know how to read or write; can you say what means she had of knowing what had been done in this transaction?

A. From what I told her myself, and I was asked to go and explain the matter to Mr. W. J. Castell, a notary of this city; and I understand that Mr. Castell was a friend of Mrs. Murphy, and I went to his office and explained to him as near as I could this whole transaction, from beginning to end. Now, if he told Mrs. Murphy anything about it, I don't know.

84 (Objected to as irrelevant.)

Q. You are sure you told Mrs. Murphy yourself all about this transaction and sale and so on, her interest, and how she was represented, and so on?

A. I am almost certain that I did; I had frequent conversations with her about it, but as I tell you I don't believe I read that act to her, but explained it to her; she came to see me two or three times.

Q. After the act of sale was passed?

A. Yes, sir.

Q. How long did those interviews last?

A. Probably half an hour, more or less.

Q. What was the purpose of the interviews?

A. Well, she came there to make enquiries as to how the Orleans Refinery was getting on, and what the prospects were of getting her money.

Q. Up to what time since the sale did she continue to make those enquiries?

A. Up to the time her son became of age.

Q. He became of age since the sale?

A. I think so; it is about two years.

Q. Where were those interviews held?

A. At my office in Poydras street.

Q. Did she come of her own accord, or did you send for her?

A. She came of her own accord; she came three times I am almost certain, and may be one more time.

Q. Did you have full conversations with her at each of those interviews in regard to the condition of the property? 85

A. I told her how the property was fixed.

Q. And she asked you when she could get paid?

A. Yes; she wanted to know when she could get her money.

Q. Was any explanation made as to what amount she was to receive?

A. No, sir; of course we couldn't say that.

Q. Did she make any direct claim as to the amount that was to be distributed pro rata?

A. No, sir; all my conversation with her was to the effect that she was to receive her pro rata of the proceeds of that property when sold.

Q. Did she raise any objection to that?

A. She never objected to it that I know of.

Q. In all of your intercourse with Mrs. Murphy after this sale, as her friend, did it impress you and did you act as if she had accepted the sale?

A. Well, she didn't talk a great deal.

(Objected to as irrelevant. Objection sustained.)

A. I don't recollect the exact conversations or replies to what I told her about the property.

Q. Did she make any objection to the transfer of the claim to these gentlemen who had bought the property?

A. No, sir; she was anxious that I should make some effort to sell
the mortgage paper for her, and I did go and see one or two
86 brokers about it, but I couldn't do anything.

Q. Since the sale?

A. Since these proceedings were commenced.

Q. Did she state what she would take for the paper?

A. No, sir; I was trying to sell; my object was to try and get an offer.

Cross-examination:

Q. Do you remember when this sale was signed by you in your capacity as liquidator?

A. I remember the date, because I have a memorandum in my pocket.

Q. What date was it?

A. The act of sale before Cuvillier was signed, Dec'r 21, 1872; the property was sold in court.

Q. When did you sign the act of sale as liquidator?

A. That act was passed June 20, 1873.

Q. Will you refresh your memory and state whether you held those mortgage notes on June 20, 1873?

A. I don't know whether I held them at that time or not; I disremember now when Mrs. Murphy took her bank-box away.

Q. You stated you had interviews with Mrs. Murphy until her son arrived at the age of majority; when was that?

A. I don't remember that.

Q. Did you deliver the notes to Mrs. Murphy previous to that?

A. I think previous to that she called and got her box.

Q. Wasn't that previous to June 20, 1873?

87 A. It is impossible for me to recollect whether it was or not.

Q. You stated in your direct examination that you were in possession of those notes when you signed the act of sale?

A. Well, possibly; I am not certain.

Q. You also stated that Mrs. Murphy called to see you and wanted you to raise money on her mortgage notes?

A. She asked me if I could sell her notes. I went to one or two brokers about it to see if I could place them.

Q. You went to them to discount her notes?

A. Yes, sir; get them to buy them.

Q. That was after the sale?

A. That was after the sale.

Q. Now, Mr. Archer, how often did you see Mrs. Murphy from June 20th to December 20th, 1873, or from that time up?

A. I reckon three times.

Q. Where was that, and when?

A. I think it was at my office on Poydras street—No. 112 Poydras street.

Q. How long after the sale?

A. Well, I can't tell exactly, but it was during the year 1873. I have a memorandum, and that is the reason that I speak and know of the interviews during that year.

Q. Was it at one of those interviews that she asked you to sell her notes?

A. I am not certain, but I think it was.

Q. How many more times did you see her during that year?

88 A. Possibly three times or four times. I can't remember exactly what time it was. I frequently saw her in a friendly way, visited her once in a while, and she would speak to me about it.

Q. Didn't she always couple her remarks to you with what you were going to do with her mortgage notes?

A. Well, no, she did not; her enquiries were when are you going to get rid of that property, get it fixed up so I can get my money; that is the way the thing jogged along.

Q. What did you state to Mrs. Murphy about that matter?

A. I couldn't possibly tell you the language exactly which I used.

Q. For whom did you buy this property as agreed at the time of the adjudication?

A. I bought it at the instigation of the mortgage creditors, who held a meeting and authorized me to do so.

Q. Who were they?

A. Well, the mortgage creditors, Mr. Harmon Doane, Leeds & Co., Lagan & Mackison, and myself composed that meeting, and it was agreed that I should go to the auction and bid on the property and buy it in if it became necessary.

Q. Wasn't Marshall J. Smith & Co. a creditor of Paul Cook & Co?

A. Yes, sir, but that indebtedness had been extinguished by the bankruptcy proceedings.

89 Q. Was Mr. John Hennessy one of the mortgage creditors?

A. I don't know whether he was or not, and I don't know really that Lagan & Mackison were. I am satisfied that Leeds & Co. were; we doubt whether several were mortgage creditors.

Marshall J. Smith sworn for defendant.

Q. Are you acquainted with Mrs. Mary Murphy, the plaintiff in this case?

A. Yes, sir.

Q. How long have you known her?

A. I suppose I have known Mrs. Murphy some 20 years, probably more. I know her more particularly as the wife of Mr. James Murphy.

Q. Who attended to her business after her husband's death?

A. I held the power of attorney from the time he died until the son arrived at the age of majority.

Q. Was it a written power of attorney?

A. Yes, sir.

(Counsel for plaintiff calls for that power of attorney.)

Witness. I suppose I can produce it. I didn't suppose it was needed; it was before Mr. Castell, notary public.

Q. Do you know anything about those notes, Col. Smith, that are now in suit here?

A. Yes, sir; I know all about them.

Q. Who purchased those notes for Mrs. Murphy?

90 A. I did.

Q. Who held those notes, or did you hold them, and, if so, how long did you hold them?

A. I held them as her power of attorney in my office, among other papers, up to the time her son arrived at the age of majority.

Q. Do you know what date that was?

A. That he arrived at the age of majority?

Q. Yes.

A. No, sir; he is in court here; he can state (22d November, 1872); the power of attorney which I held was never cancelled, but I considered it cancelled as soon as her son arrived at the age of majority, and I turned the papers over to him as soon as he came down.

Q. Did you ever have any interview with Mrs. Murphy after you made the sale of the property of Paul Cook & Co. in bankruptcy?

A. Yes, sir.

Q. State what explanation, if any, you made to her in reference to that transaction.

A. I can't give the exact words of the explanation, but I explained to her time and time again how the transaction stood—how the records stood. The language or words that I used I can't remember. I have been at Mrs. Murphy's house. I was in the habit of going
there frequently, and always treated her as a friend of the family,
91 and also my being a very intimate friend of her husband, I acted
in this matter as a friend, never charging her a cent for attending to her business. I simply acted in the capacity of a friend of her husband, who had been a devoted friend of my family during the war. There were some things that Mrs. Murphy didn't understand, because she is a person who does not read or write herself, and I think she signs with a cross-mark; that is my impression; but time and time again, before I gave up the power of attorney, I would explain to her all these matters, and she would come up and ask me how it was her property was not sold, and when the property would be sold. I explained to her the depressed condition of real estate and the interest she had in the property, and, as far as I could, see if she understood her interest.

Q. Did you, or did you not, explain to her and represent to her that that property was bought for her account?

A. Yes, sir; I always explained it so.

By Mr. COLEMAN:

Q. How do you know it was bought for her account?

A. Well, I was cognizant of the fact through Messrs. Archer and Doane.

Q. Through statements made by Mr. Archer?

A. No, sir; by Mr. Doane. Mr. Archer did not do anything for Mrs.
Murphy without consulting me. I was in St. Louis most of the
92 time, but I would come here and I would see Mrs. Murphy, and
I know she knew her interest in this thing. I think it was last spring that the Factors' and Traders' Ins'ce Co. sent to her for her insurance of her interest of the property, and she said then that she did not want her interest insured. I think it is about two months ago that she came to me and said that she would like to sell her interest.

By Mr. BROWN:

Q. Didn't she have the notes with her?

A. I don't know whether she did or not; but she said she would be willing to take half the amount due her. I never attended personally to Mrs. Murphy's business since, but I went around to Mr. Archer and got him to go and see Mr. Palfrey, to see if he wouldn't buy the notes. She understood as thoroughly as any one her interest. It was no fault of mine what her interest was, and I wanted to get her something, because when the property comes to be sold there will be very little for any of them. I have been anxious for her to get something.

Q. Did you represent to her how her interest was secured?

A. I have represented it to her as well as a man could possibly explain anything to a person. I explained it to her in the presence of her son, and he understands.

93 Q. Did you explain to her?

A. Certainly; just as far as I was able.

Q. Did she raise any objection to that?

A. Never did to me.

Q. What was her interest?

A. She held those two mortgage notes; that was her proposition. I don't know know what it was, but I was cognizant of the fact that a mechanic's lien on this property, and I was assured of the fact by legal parties here that if they came in that they would be satisfied before the mortgages notes were, and advised her of the whole thing. Mrs. Murphy was a friend, and I had no interest in it whatever, and it was on account of her husband, who was a friend of mine, that I took this interest in her.

Q. Did you ever tell her of the amount due her which was secured?

A. I couldn't convey it otherwise. I knew that there was so much, including the notes and preferred claims. I think the whole was some $65,000, and that she had a proportion of $20,000 in this property that was bought in.

Q. You mean the entire amount of $20,000?

A. Not $20,000, because she knew very well that if the property wouldn't bring it she couldn't get that amount. She knew very well what her interest is. She is an honest, upright woman, and when you ask for the truth she will tell you.

94 Q. Where did these interviews take place that you speak of; were they held in your office?

A. No, sir; at her house. I was always in the habit of going around when I was down here. I always took an interest in her welfare. There was only one interview at my office, and that was the last one, and that was when I went around to get Mr. Archer to go and see if Mr. Palfrey would buy her interest. It was for her interest, for her's alone, because I had no other.

Q. Do you know whether she stated the amount that she would be willing to dispose of her interest?

(Objected to. Objection sustained.)

Q. Did you represent to her that the property was bought for herself and the other creditors?

A. I never had any other interview with her. I can't tell you the exact words or the language used, but the idea conveyed all the time by me to her, every time she asked me in regard to the matter, was actually that the property was bought in to save her interest.

Q. With the other creditors?

A. Of course.

Q. Did she offer that interest for sale to anybody?

A. Well, I understand there has been objection to that.

95 Q. Did she ever offer her interest for sale?

A. I told her when she asked me to see the Factors' & Traders'

Ins'ce Co., and I told her that I would attend to it, and I did by asking Mr. Archer to go and see Mr. Palfrey about it; I told him that Mrs. Murphy was anxious about this matter and it was getting to be an eye-sore, and I told him that if it was possible to make an arrangement and get what he could for her, and he told me he would go and see Mr. Palfrey the president of Factors' & Traders' Ins'ce Co.

Q. Was any effort made by you to dispose of her interest to Col. Palfrey or any one else?

A. No, sir; but I could have gotten one-half. I was authorized to sell it; she said she was willing to take half.

Q. Would you have taken it?

A. I would, I felt authorized that I could take half.

(Objected to; objection sustained.)

Act of sale marked D offered in evidence by Mr. Egan.—Filed June 12th, 1876.

WIDOW MARY MURPHY
vs. } No. 7255.
FACTORS' & TRADERS' INS'CE CO. & OTHERS.

UNITED STATES OF AMERICA,
State of Louisiana, City of New Orleans:

96 Before me, Pierre Charles Cuvillier, notary public, in and for this city and parish of Orleans, duly commissioned and sworn, and in the presence of the witnesses hereinafter named and undersigned, personally came and appeared—

1°. Marshall J. Smith, of this city, herein acting as the trustee in the matter of Paul Cook & Co., bankrupts, as hereinafter more fully set forth.

2°. Charles J. Leeds, of this city, a member of and herein acting for his firm of Leeds & Co. in this city, composed of John Leeds and the said Charles J. Leeds.

3°. M. D. Logan, of this city, herein acting for his firm of Layan & Mackison, of this city, composed of himself and James Mackison.

4°. John Hennessy, of this city, acting for himself.

5°. Thomas A. Archer, of this city, herein acting as the liquidator of the firm of Marshall J. Smith & Co. in this city, composed of the appearer and Marshall J. Smith, said Archer herein acting as such liquidator, in virtue of an instrument of agreement betweeen the creditors of said firm of Marshall J. Smith & Co., wherein said Archer is appointed and recognized as such liquidator.

5°. And Harmon Doane, president of the Factors' and Traders' Insurance Company, a corporation domiciliated in this city, fully em-
97 powered for the purposes of said act by a resolution adopted by
the board of directors of said company at a meeting held on the seventeenth day of March, 1873, a certified copy of which resolution is hereto annexed, and made a part of these presents, who severally declared as follows:

Paul Cook and Justus Vairin, jr., both of this city, were associated in the transactions of commercial business in this city under the firmname of Paul Cook & Co.

On the twenty-first of February, 1871, the said Paul Cook & Co. filed their petition in the United States district court, district of Louisiana, sitting at New Orleans, praying to be adjudged bankrupts upon their own petition, which petition had previously been sworn to and sub-

scribed by them on said day before C. S. Kellogg, register in bankruptcy, and were declared and adjudicated bankrupts upon their said petition by the said C. S. Kellogg, register in bankruptcy aforesaid, on said date, and to whom in an order rendered by said court on said date they were referred to, have their petition and schedule filed therewith, examined as to correctness in form and number, which examination was so made, and correctness ascertained and certified to by said register in bankruptcy on the first of March, 1871, who on the same date
issued a warrant in bankruptcy against the estate of said Paul
98 Cook & Co. to prove their debts and choose one or more assignees of the estate.

On the thirtieth of May, 1871, the first meeting of creditors under said warrant, representing over three-fourths of the debts due by said bankrupts, was held before the said register in bankruptcy, proved their debts and chose no assignee, but adopted a resolution for the appointment of a trustee to act under a committee of the creditors, and that the estate of said bankrupts be wound up and the proceeds distributed among the creditors by said trustee; that Marshall J. Smith be nominated such trustee to take, hold, and distribute the said estate; that Carl Kohn, Leeds Greenleaf and Harmon Doane be such committee of creditors.

It was ordered by said court sitting in said matter, by order dated June 12th, 1871, and confirmed 20th June, 1871, that the resolutions of said creditors at their meeting of the 30 May, 1871, be adopted and that Paul Cook & Co., bankrupts, convey, transfer, and deliver all the property specified in their schedule, and owned by them at the date of the filing of their said petition, to Marshall J. Smith, the trustee nominated in said resolutions and should act under the direction of said committee of creditors.

Among the assets belonging to the said Paul Cook & Co. and surrendered by them upon their adjudication in bankruptcy was the following described property, viz:

99 Fourteen lots of ground, situated in the first district of this city, in the square bounded by Calliope, Pearl, Delord and Peters streets, designated by the numbers six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, nineteen, twenty, twenty-one, and twenty-two, on a plan made by Louis H. Pilie, surveyor, dated twenty-third of December, 1871, a sketch whereof is hereto annexed and made part hereof, according to which said lots measure as follows:

Lot No. six forms the corner of Calliope and Pearl streets, and measures twenty-nine feet five inches and four lines front on the former, by eighty-four feet five inches and fine lines in depth, between equal and parallel lines and front on the latter street. Lots seven to twelve inclusive, measure each twenty feet eleven inches front on Pearl street, by ninety-six feet ten inches in depth between parallel lines and adjoin each other. Lots thirteen, fourteen, and fifteen, adjoin each other and measure, viz: Lot No. thirteen, twenty-one feet front on Pearl street, one hundred and five feet six inches in depth on the line of lot Nos. twelve, twenty-seven feet five inches on an oblique rear line, thence an angle and five feet towards Delord street in an oblique line, and thence a depth of eighty-five feet on the line of lot No. fourteen and up to Pearl street.

Lot No. fourteen, twenty-one feet front on Pearl street, twenty-
100 one feet ten inches on an oblique rear line, eighty-five feet deep
on the line of lot No. thirteen, and ninety feet six inches deep on the lot No. fifteen. Lot No. fifteen, thirty-seven feet two inches front on Pearl street, thence fifty feet three inches on a converging depth line

has heretofore been made by said Paul Cook & Co., as shown by the hereto annexed certificate from said conveyance office.

And by reference to the hereto annexed certificate from the office of the recorder of mortgages for this parish, it will appear that the following encumbrances are the only ones recorded in the name of said Paul Cook & Co. against the herein conveyed property, to wit:

1°. The usual drainage privilege.

2°. Book 88, fo. 570. The mortgage they granted in favor of S. L. Moss, by act before Theo. Guyol, notary, dated 18th March,
106 1870, to secure forty thousand dollars, interest and costs.

3°. Book 89, fo. 258. The privilege in favor of Leeds & Co., as per their bill dated 30th June, 1870, sworn to and subscribed before John P. Montamat, 3d justice of the peace, on the 6th of July, 1870, for eight thousand six hundred and eighteen $\frac{06}{100}$ dollars, balance of account, &c.

4°. Book 89, folio 264. The privilege in favor of Lagan & Mackison from their bill sworn to and subscribed before G. W. Sadler, 1st justice of the peace, on the 8th of July, 1870, for three thousand four hundred and forty-three $\frac{17}{100}$ dollars.

5°. B. M. 13, folio 730. The general mortgage resulting from three judgments, viz: 4th district court, 19th December, 1870, in favor of Race Foster & E. T. Merrick (No. 24,360), for $2,717.15 *dollars*, interest and costs.

6°. Another in favor of Chaffraix & Agar (B. M. 13, fo. 777), rendered by the seventh district court, on 13th February, 1871 (No. 7871), for $4,307.69, with interests and costs.

7°. And one in favor of Carl Kohn, rendered by the same court (7th district) on said 13th February, 1871 (No. 7881), for $12,458.75, interests and costs. (B. M. 13, fo. 777.)

8°. The general mortgage in favor of this State resulting from a judgment rendered by the 3d district court on the 29th April, 1871 (No. 13010), for two hundred & seventy-two $\frac{25}{100}$ dollars, interest and costs. (B. M. 14, fo. 61.)

107 9°. Two privileges in favor of this State, one for two hundred and seventeen $\frac{50}{100}$ dollars (B. T. 9, fo. 10), and the other for fourteen $\frac{50}{100}$ dolls. (B. T. 9, fo. 10), for taxes of 1870.

10°. Two other privileges in favor of this State, both to amounting one hundred and twenty dollars, interest and costs, for State taxes of 1869. (B. T. 4, fo. 1; B. T. 4, fo. 1.)

11°. Three judgments rendered by the fourth district court on the 27th of March, 1872, in favor of this city, all for six hundred and eighteen $\frac{75}{100}$ dollars, interest and costs (each recorded B. T. 97, fo. 345).

12°. Four judgments in favor of this city rendered by the fourth district court on the 16th November, 1870, for the total sum of seven hundred and thirty nine $\frac{37\frac{1}{2}}{100}$ dollars, with interest and costs, each recorded B. T. 97, Fo. 354.

13°. Three privileges in favor of this State, one for one hundred and seven $\frac{50}{100}$ dollars; another for three hundred and twenty-two $\frac{50}{100}$ dollars, and the third for twenty-one $\frac{50}{100}$ dollars, with interest and costs, each recorded B. T. 98, fo. 17.

14°. And the general mortgage resulting from a judgment rendered by the eighth district court on the fourth of April, 1872, for ten dollars, interest and costs, B. T. 97, Fo. 472.

All of which before-recited encumbrances will be disposed of in due course of law.

This sale is made and accepted agreeably to the public adju-

108 dication aforesaid, and in accordance with the aforesaid deviation from the terms thereof for and in consideration of the price and sum of forty-five thousand dollars, which the said Factors & Traders' Insurance Company thro' the said Harmon Doan, president thereof, has presently paid in cash in ready money to the said Marshall J. Smith, trustee aforesaid, the receipt whereof he hereby acknowledges, and for which he grants acquittance, and which sum is to be retained by the said trustee, subject to such disposition thereof as may be ordered by the aforesaid district court and the creditors of the said Paul Cook & Co.

And the said Charles J. Leeds for the firm of Leeds & Co., the said M. D. Lagan for the firm of Lagan & Mackison; John Hennessy for himself and T. A. Archer, liquidator of Marshall J. Smith & Co., do hereby declare that they severally bid for and became adjudicators of the said property for the purpose and with the intent of conveying the title to the same into the said Factors' & Traders' Insurance Company as herein done.

And whereas there were certain sums of money advanced by various parties to *a* make a fund for paying costs, charges, and expenses to the assignee, preliminary to removing the same from his custody 109 and transferring it into the hands of trustees, and whereas there are other costs, charges, and expenses incurred in administering the same by the trustee:

Now, therefore, the said coadjudicatees hereby authorize and empower the said Factors' and Traders' Insurance Company to settle the same, thereby declaring that all sums expended by said company for said purpose shall be properly chargeable to the adjudication price of the property herein conveyed.

Thus done and passed in my office at the said city of New Orleans, in the presence of Martin L. Ainsworth and J. Henry Forcelle, witnesses of lawful age and domiciliated in this city, who hereunto sign their names with the said appearers and me the said notary on this twentieth day of June, in the year of our Lord one thousand eight hundred and seventy-three.

Original signed:
" " MARSHALL J. SMITH, *Trustee.*
" " HARMON DOANE, *President.*
" " JOHN HENNESSY.
" " T. A. ARCHER.
" " LAGAN & MACKISON.
" " P. pro. LEEDS & CO.,
" " LEEDS GREENLEAF.
" " CHAS. J. LEEDS.
" " For LEEDS & CO.
" " P. CH'S CUVELLIER,
Not. Pub.
" " M. L. AINSWORTH.
" " J. H. FORCELLE.

110 Registered in conveyance book 104, fos. 9 and 10.
New Orleans, June. 21st, 1873.
[SEAL.] (Signed) C. R. FISH, *Register.*

I, John Bendernagel, custodian of notarial records for the parish of Orleans, do hereby certify the above and foregoing to be a true copy of the original act passed before the late P. Chas. Curvellier, notary public, and now in my possession.

Witness my hand and official seal at New Orleans this twenty-second of May, 1875.

[SEAL.] (Signed) J. BENDERNOGEL,
Custodian of Notarial Records.

Order and continuance.—Minutes 12*th June* 1876.

WIDOW MARY MURPHY
vs.
FACTORS' & TRADERS' INS'CE CO. & ALS. } No. 7255.

This cause came on this day for trial.

J. D. Coleman, for plaintiff. Defendants & warrantors herein all represented.

When, after hearing pleadings and evidence, the hour of adjournment having elapsed, said cause was continued by preference.

Testimony.—Filed June 26*th*, 1876.

111 WIDOW MARY MURPHY
vs.
FACTORS' & TRADERS' INS'CE CO. & ALS. } No. 7255.

Fifth district court for the parish of Orleans.

Testimony taken in open court June 26th, 1876.

Owing to the fact of Mr. Marshall J. Smith's absence on account of sickness, counsel for plaintiff waives the cross-examination.

Defendant offers in evidence the certificate of the recorder of mortgages, together with the affidavit attached of Charles J. Leeds & Co.'s claim.

Plaintiff's counsel objects to any proof of the privilege in favor of Leeds & Co. on the property mortgaged, on the ground that Messrs. Leeds & Co., in a notarial act of sale, relinquished and renounced and abandoned in favor of the Factors' and Traders' Insurance Company all rights they had by virtue of the adjudication of the identical property, &c., &c.

Counsel for defendant states that its is offered to show, in the event that it should be held that this act is an error, that the respective parties may have the evidence before the court in order that
112
they may be admitted to their respective rights and privileges without further litigation.

The defendants offer in evidence the document marked E.

Defendants offer in evidence Schedule A of the creditors holding security in the bankruptcy proceedings of Paul Cook & Co., No. 11013 of the United States district court for the district of Louisiana.

(Objected to as irrelevant.)

Defendants offer the document as rem ipsam.

(Objection sustained, because it is entirely outside of the record or pleadings; defendants except.)

Defendants propose to offer Schedule B in the same matter of bankruptcy of Paul Cook & Co.

113 (Objected to; objection sustained; defendants except.)

Defendants offer in evidence the adjudication of bankruptcy upon the debtors' petition of Paul Cook & Co.; also the order of the United States district court affirming and homologating the resolutions by which Marshall J. Smith was appointed trustee; the resolutions of the creditors under section 43 in said bankruptcy.

Counsel for plaintiff makes no objection to the introduction of the order affirming and homologating the resolution of the creditors of the firm of Paul Cook & Co. appointing Marshall J. Smith as trustee, nor to the copy of the resolutions themselves by which that was done.

Defendants offer in evidence the motion to sell the estate in the bankruptcy filed December 1st, 1871; also the resolution of the committee of creditors upon which the motion and order of the court was signed, directing the sale.

Also the petition and order to confirm the sale, filed June 21st, 1873, a list of the property surrendered by the bankrupts, Paul Cook & Co., furnished to Marshall J. Smith, trustee, under date of November 21st, 1871, the whole marked "F."

Defendants offer in evidence the proof of debts before C. S. Kellogg, register in bankruptcy, and the vouchers attached thereto, and the list of proved debts furnished by the register to the court.

(Objected to as irrelevant, and also that it cannot affect the plaintiff in this case, because she was no party to the proceedings.

114 The court admits the evidence to prove ram ipsam.)

W. J. CASTELL sworn for defendants.

Q. Do you know anything of this purchase by the Factors' & Traders' Insurance Company, under the order of the bankrupt court, of the sugar refinery that belonged to Paul Cook & Co.?

(Counsel for plaintiff objects to any parol testimony going to show purchase of real estate.)

A. Yes, sir; I read some of the papers connected with it.

Q. Did you acquire a knowledge of this sale after the sale took place?

A. Well, I will tell you all I know. I went to Mr. Palfrey—I think he was secretary of the Factors' & Traders' Insurance Company—and asked him what position—what the thing was. He did not seem to know much about it, and he told me to speak to Mr. Randolph, the attorney, and he didn't seem to know anything, and then, I think, I went with Mr. Palfrey or Mr. Harmon Doane to Gen'l Gibson's office, who was the attorney of the insurance company, and he told me that he was going to look into the thing and bring it to a close.

Q. For whom did you go and make these inquiries?

(Objected to on the ground that it is an effort to show an

115 agency on the part of Mr. Castell in relation to real estate which is not susceptible to proof by parol.)

A. I made the inquiries from Mrs. Murphy. I told her to bring me the notes and I would make inquiries to see what they were.

Q. Did she request you to do it?

A. I told her to bring me the notes; she mentioned the circumstance that she held the notes, and I asked her to bring the notes and I would make inquiries to see what they were; that I was acquainted with Mr. Doane or Mr. Palfrey, and I would see them.

Q. Did she furnish you the notes?

A. I think so; I am not sure.

Q. Do you remember where that occurred, what year and what month?

A. I couldn't tell you. I haven't the least recollection.

Q. How long ago was it; this is June, 1876; was it two years ago or one year ago?

A. Well, I can't say whether it was during the lifetime of Mr. Doane or not. Mr. Palfrey recollects the transaction.

Q. Was it after the sale of this property to the Factors' and Traders' Insurance Company?

A. It was, but I don't know whether the sale was recorded at the time or not.

Q. It was after the sale though?

A. I think so. I never looked into the thing. I had very little to do with the matter.

Q. Did Mrs. Murphy come to your office to see you about this matter?

116 A. I don't think she came specially; she came there on other business, and she mentioned this thing, and I told her to bring the notes.

Q. Had you more than one interview with her in relation to those notes?

A. I might have had. I don't think I had. She has often spoken to me and also her son.

Q. Touching what point?

A. I made a proposition to her that I would make inquiries, being acquainted with Mr. Doane or Mr. Palfrey. I told her that I would see what the notes were.

Q. What was the nature of these inquiries?

A. I never made any inquiries. I wanted to know the value of the notes; what Mrs. Murphy was entitled to, or what position she was in.

Q. Was that her desire, that you should make inquiries concerning that point?

A. I proffered to do it for her.

Q. How came you to do that?

A. Well, she told me about those notes, and I told her to bring the notes and I would examine into the thing.

Q. Was anything said by her about the sale of that property?

A. No, sir; I don't think she knew anything about it or understood anything. I don't think she is a person that understands what it was.

Q. Did she bring you these notes?

A. I think so.

117 Q. Very soon after that first meeting you speak of, or how long after?

A. I don't know.

Q. Did she tell you where the notes were at the time she first called?

A. No, sir.

Q. Did she say who held them?

A. I can't recollect. I paid very little attention. I may not have seen the notes at all for all I know.

Q. Did she bring you the notes?

A. I was under that impression that she did, but I am not certain.

Q. Did she ever speak to you about having any agent in the city?

A. No, sir. Marshall J. Smith was her agent.

Q. Did she allude to him as her agent at that time?

A. No, sir; I had made a power of attorney. I think she signed a full power of attorney in favor of Mr. Smith.

Mr. COLEMAN. I call for that power of attorney.

Q. Was that in her individual capacity or as executrix?

A. I couldn't say; I wouldn't be certain. I think it was in her representative capacity. I know it was immediately after the death of her husband.

By MR. GIBSON:

Q. Did you see her frequently about this matter of the notes?

118 A. Well, I didn't see her about that specially. I saw her or her son probably a half dozen times.

Q. Did her son come to see you in her behalf?

A. Well, he might have come on his own behalf.

Q. Did he confer with you about these notes?

A. Yes, sir; he came to know what news I had about them.

(Counsel for plaintiff objects to any proof of the ratification of an act of sale by parol and reserves his objection.)

By Mr. GIBSON:

Q. Did you ever explain to Mrs. Murphy or her son the condition of this property or her notes?

A. I don't know that I did, for I never could understand it myself. I gave the papers to your brother. When I went back to the insurance company Mr. Doane said they had paid the taxes & other things, and then he took the papers and placed them in the hands of Gen'l Gibson, who said that he would look into the thing, and then I thought what could be made out would be made; and everything was safe. I went as a friend of Mrs. Murphy, and I thought then that, the hands that had hold of it, it was perfectly secure.

Q. It was her desire to get her share in there?

A. Well, I suppose she wanted to know what the value of her notes were; that is what I looked for to see.

119 Q. Did she ever ask you for any settlement of her interest in this matter?

A. No, sir.

Q. Do you know Mrs. Murphy quite well?

A. Yes, sir.

Q. Is she a woman of superior, ordinary, or inferior intelligence?

A. Well, I will say about middling; rather inferior, if anything, in business.

Q. Does she read and write?

A. I think she reads. I don't think she writes.

Q. Can she read writing?

A. I don't know.

Q. Did Mrs. Murphy ever allude to Mr. Thomas A. Archer as holding her notes or representing her?

A. I think she did, or Marshall J. Smith & Co. Archer was a partner. I don't recollect. I think she said they had the notes.

Q. Did she ever mention Mr. Archer's name directly as the party representing her?

A. She said Mr. Archer was a friend of hers.

Q. Do you know whether or not that the notes were in possession of Smith & Co.?

A. I don't know.

Q. You can't remember what time that was?

A. No, sir.

Q. Was it two years ago, or one year ago?

A. I think it is more than a year ago.

120 Cross-examination:

Q. Did you ever hold the power of attorney of Mrs. Murphy?

A. No, sir.

Q. Were you ever her agent?

A. No, sir.

Q. When Mrs. Murphy came to see you didn't she come for information?

A. Yes, sir.

Q. At the time she came to see you did she give evidence that she knew all about the matter that had transpired?

A. I think not.

Q. She was ignorant of what had been done?

A. She didn't seem to understand and I told her to bring her notes and I would look and see what it was.

Q. You went to see of what value the notes were?

A. Yes, sir.

Q. Did you report to Mrs. Murphy the inquiries you had made?

A. Well, it was so jumbled up, I couldn't say anything about it.

Q. All your information in this matter was derived from hearsay?

A. I saw documents—either Mr. Doane or Mr. Palfrey showed me a statement that they had of the account, and then we went up and gave all the papers to Gen'l Gibson.

Redirect examination:

Q. You say it wass all jumbled up; what do you mean?

121 A. I couldn't tell what the value of the notes was, what the property was, or anything.

Q. Did you inform Mrs. Murphy that the matter was involved in the bankruptcy of Paul Cook & Co.?

A. I don't recollect.

Q. Was it after the proceedings in bankruptcy?

A. I suppose it must have been all over.

Q. Did you not inform her that there was a proceeding in bankruptcy to sell the property?

A. I couldn't tell.

By Mr. COLEMAN:

Q. Did Mrs. Murphy tell you that she consulted an attorney in the case?

A. She told me she consulted you, when she did.

Q. Didn't you bring the notes to Mr. Patrick Irwin and asked him what value he attached to the notes?

A. I may have done it, but I don't recollect. I paid very little attention to the thing.

E. A. PALFREY sworn for defendants.

Q. What is your business and place of residence?

A. President of the Factors' & Traders' Insurance Company, No. 37 Carondelet street, New Orleans.

Q. Will you be kind enough to state what you know in reference to this transaction?

A. Beginning where?

Q. I will ask you whether you remember the visit of Mr. Castel to the office of the company?

122 A. Very well.

Q. Do you remember at what time when that occurred?

A. It must have been after the sale took place, because otherwise he wouldn't have come to me for the information.

Q. Do you think it was since June 20th, 1873, when the sale took place?

A. Yes, sir.

Q. Will you state what occurred?

A. My recollection is that Mr. Castell came there fully informed of the nature of the case, as his question was simply to know what the interest of Mrs. Murphy was and when we were going to sell the property and pay her up.

Q. That is, to make a second sale of the property?

A. Yes, sir.

Q. Did he come more than once?

A. He came twice, if I recollect, and both times after the property was placed in the name of the company.

Q. Did any one else ever come to see you with reference to this property?

A. Mr. Coleman did.

Q. Do you remember what the nature of his inquiries were when he came to see you?

A. I think that he wanted to understand what the nature of the transaction was and how the act was first.

Q. He came to you to get general information?

123 A. Yes, sir; the second time he came I gave him the act.

Q. Did you pay any taxes, State and city taxes, upon that property previous to the sale of it by the bankrupt court?

(Objected to; objection sustained on the ground that no evidence is admissible to show what costs had been paid on this property. Defendant excepts.)

Q. Did you ever see Mrs. Murphy yourself in reference to this matter?

A. I never saw her in my life that I know of.

Q. Do you know whether she ever called at the office of the Factors' & Traders' Ins. Co.?

A. I don't know.

Q. Did anybody call to see you, representing himself as the agent of Mrs. Murphy, in her behalf?

A. Nobody but Mr. Coleman.

By Mr. COLEMAN:

Q. Did Mr. Coleman represent himself as her agent?

A. Well, I mean you came as her attorney.

By Mr. GIBSON:

Q. Do you know who held these notes of Mrs. Murphy?

A. You mean who had them in custody?

Q. Yes; who was the holder of them?

A. I understood Marshall J. Smith held them. We held two of them and Mrs. Murphy held the other two.

124 (Counsel for plaintiff objects to what witness understood.)

Q. From whom did you understand that Marshall J. Smith held these notes?

A. From Mr. Marshall J. Smith himself.

Q. What was your conversation with Marshall J. Smith about these notes?

A. That I can't recollect.

Q. Did Mrs. Murphy's son ever call on you?

A. No, sir.

Cross-examination waived.

LEEDS GREENLIEF sworn for defendants.

Q. Are you familiar with these transactions, the sale of property of Paul Cook & Co. and its purchase?

A. I am familiar with the facts at the time. I think I could refresh my memory by the notes I had.

Q. Whom did you represent?

A. Leeds & Co.

Q. Has any one approached you since the purchase of the property in reference to Mrs. Murphy's interest?

A. Not that I recollect of at the moment. No one approached me.

Q. To compromise in her interest?

A. None that I remember.

Q. Do you know Mrs. Murphy?

A. I do not.

Q. Nor her son?

A. Nor her son.

Q. You had no communication with any person representing himself as the agent of Mrs. Murphy?

125 A. Not since the sale.

Cross-examination waived.

Mr. EGAN. I offer in evidence in behalf of Percy Roberts, assignee in bankruptcy of the firm of Lagan & Mackison, the bill of Lagan & Mackison against the firm of Paul Cook & Co., and the certificate of the recorder of mortgages showing that it has been duly recorded. I also offer in evidence the bill of John Hennessey & Bro. against Paul Cook & Co., also the certificate of the recorder of mortgages showing that they had been duly recorded.

(Objected to.)

Counsel for plaintiff admits that Leeds & Co. did certain work at the Orleans Sugar Refinery, and that the value of said work amounted to $8,695.42, being a balance due for said work as stated in the certificate of the recorder of mortgages, filed in evidence by the defendants. I also admit that Lagan & Mackison did certain work to the amount of $3,443.17. I admit that John Hennesey did certain work at the Orleans Sugar Refinery; the amount here is specified at $1,053.12.

I deny, in connection with my admission, that John Hennesey ever recorded his claim for work, and I deny that Leeds & Co. & Lagan & Mackison ever recorded their privilege in the manner required by law, to give them a preference over a pre-existing mortgage.

Counsel for defendant offers to prove the following expenses incurred upon the property in question:

126 1st. Costs, attorneys' fees, auctioneers, &c., at $3,847.05; taxes, State and city, $3,114.65; repairs, $768.13; watchman, $2,600 for the care of property; trustee of Paul Cook & Co., $1,125; total, $11,454.83.

(Objected to by plaintiff on the ground that the defendant the Factors' & Traders' Insurance Company occupy no better position than a debtor holding property incumbered with plaintiff's mortgage containing the pact de non alienando, and cannot set up any defence that the debtor could not, and cannot make proof of any expenditure or charges to the prejudice of the plaintiff's mortgage.)

(Objection sustained. Defendants except.)

E. A. PALFREY, recalled by Mr. Browne.

Q. The Factors' & Traders' Ins. Co. still hold that property?

A. Yes, sir.

Q. Are you ready to pay Mrs. Murphy her share in this matter?

A. Always, when it can be ascertained.

By Mr. COLEMAN:

Q. Are you ready to pay Mrs. Murphy her notes, the face and interest?

A. No, sir.

Q. Do you now hold all the property you purchased at that sale, machinery, engines, apparatus & appurtenances belonging to the Orleans Sugar Refinery?

A. No, sir.

Q. Where are they?

A. The machinery I sold.

127 Q. That was incumbered by this mortgage?

A. Yes, sir; and I don't know whether the machinery was incumbered by that mortgage or not.

Q. Was it in the Orleans Refinery or not?

A. Yes, sir.

Q. Bought by you on the 20 June, 1873?

A. Yes, sir.

Q. When did you sell that machinery?

A. This spring.

By Mr. GIBSON:

Q. Have you ever offered to pay Mrs. Murphy what you considered a just proportion of the proceeds?

A. I can't say that I offered Mrs. Murphy, but I always said pro rata what we got ourselves.

Mrs. MARY MURPHY, sworn for defendants.

Direct examination by Mr. BROWNE:

Q. When did Marshall J. Smith become your agent, do you remember?

A. After my husband's death.

Q. Can you remember when that was, madam; about what year?

A. It is six years next August or September.

Q. That would make it about 1870?

A. Yes, sir.

Q. How long did Col. Smith remain your agent?

A. Until my son came of age.

Q. You remember how long that is now?

A. I think, 1872, the 27th of November.

128 Q. When did you get your bank-box from Col. Smith? Do you remember what time that was? Was it some time after your son became of age?

A. Yes, sir; soon after, in the beginning of January, the next year, 1873.

Q. Did you give Col. Smith a receipt for it, or did he just turn it over to you so?

A. My son demanded the papers.

Q. Did Col. Smith have a key to your bank-box?

A. There was two keys; Mr. Archer stated he had one.

Q. Who had the keys?

A. I had a key and he had a key.

Q. Those notes were in that bank-box?

A. Yes, sir; the notes were in the bank-box.

Q. When you got it?

A. Yes, sir.

Q. Had Col. Smith or Mr. Archer been acting for you, up to the time you got the bank-box, as your friend and adviser?

A. Very little. Mr. Smith wasn't in the city, and occasionally I met Mr. Archer, and I wanted him to sell the notes because I needed the money.

By Mr. GIBSON:

Q. Whom did you go to see after this sale about your notes?

A. I didn't go to see any one. I was told by them my notes were good all through, that I held the notes, and that they were good. I went to see nobody.

129 Q. Who was it told you that?

A. Mr. Smith always told me about the sale; I knew nothing about it; they never told me; I never asked him, for I knew nothing about it.

Q. Did you ever see Mr. Castel about it?

A. I saw him several times; he was the notary, and a big friend of my husband. I used to go and see Mr. Castel on other business. After I got the notes I brought them down there, and I met Paddy Irwin and he looked at the notes, and he said they were not worth anything; and Mr. Castel said he knew nothing about it until he seen the notes, and then he said he would enquire what he could get for them.

Q. Did any one ever tell you what transpired about this sale?

A. Mr. Coleman, he was the only one told me, and I had to pay him too; that was the only information I ever got.

Q. Did Mr. Archer ever tell you anything about it?

A. He never told me anything about that property.

By Mr. HALL:

Q. Were you present in the court-room when Mr. Archer testified?

A. Yes, sir.

Q. Do you remember his testifying that you called on him several times?

130 A. That was to get him to sell the note.

Q. That was after the sale?

A. Yes, sir; I had the bank-box at the time, years before that.

Q. Did you ever ask Mr. Archer what your interest in the property was after the sale?

A. I never had nothing to do with the property. I was told the notes was my share.

Q. Mr. Archer told you that?

A. He often repeated that, and Mr. Smith said so too. After the sale I know nothing about it.

Q. You said Mr. Archer often after the sale?

A. Not often; I saw him when he was sick; his wife sent for me; he was at his home in bed.

Q. Did you ever go to his office?

A. I went to his office to find out upon other business.

Q. What other business was that?

A. I went there to find out the memorandum, and the papers and the money spent in the estate of my husband.

Q. Who was your representative?

A. It was Mr. Smith that was the agent.

Q. Who first told you about the property being sold?

A. I heard them all say they bought it.

Q. Who said so?

A. I heard Mr. Archer said so.

Q. Where?

A. He said so at our house.

Q. What did he say?

131 A. At the time he said that the big refinery was bought; that the Factors' and Traders' Insurance Company authorized him to buy it.

Q. Did he inform you then that it was bought for all the creditors?

A. No, sir.

Q. Did you never ask what your interest in that property was, & to have it put down in writing so you would know?

A. No, sir.

Q. Did Mr. Smith explain it to you?

A. No, sir.

Q. No one explained this to you?

A. No, sir; except Mr. Coleman—I employed him.

Q. For what purpose did you employ him?

A. To find out how my money stood.

Q. How long after the sale was that?

A. A year and a half I suppose.

Q. You heard them speak of the property having been sold and your interest in the matter?

A. I don't know anything about the property; they told me all through that my notes were good.

Q. Who told you?

A. Mr. Smith and Mr. Archer told me my notes was what I had to stand on.

Q. That was $20,000; did you understand from them that you still had a claim for $20,000?

132 A. I understood I had the notes and they was good, and that is all I understood.

Q. Didn't you understand from them that the property had been sold at the bankrupt sale, and that you would have to take a certain proportion?

A. No, sir; Mr. Coleman is the only one ever gave me any information.

Q. That was a year and a half after the sale?

A. I can't tell; it was a good while after. I needed money and I tried to raise money on the notes.

Q. Who did you try to raise money from?

A. I asked Mr. Coleman, because I needed money. I only wanted to sell the notes all through.

Q. You knew the property had been sold at a bankrupt sale?

A. Yes, sir; but I held my notes and my notes were worth the money all the time. That is what I understood.

Q. Did you ever ask what that property sold for?

A. No, sir; I heard it.

Q. Who from?

A. Wasn't it in the papers I heard it?

Q. Who told you how it was in the papers?

A. My son, that had an interest in that.

Q. Did Mr. Archer ever inform you anything about the sale?

A. No, sir.

Q. Did you never talk to Mr. Archer or Mr. Smith about the sale?

133 A. Mr. Archer soon left after the sale, and I didn't see him except once when he was sick in bed, when his wife sent me a word to come, and there was no talk about it then.

Q. Did you never talk to Mr. Smith about it?

A. When I asked Mr. Smith he always had some trouble or something else to do, he said he wished he never had anything to do with it.

Q. Were you satisfied with that answer?

A. That was the answer, and he told me the notes would be good for the money.

Q. Did your son ever talk to you about this after he became of age?

A. We always talked about selling the notes, because we needed the money.

Q. Did you never send him to find out what your interest in the property was?

A. No, sir; where would I send him?

Q. You heard of the sale?

A. I heard of the sale when I seen Mr. Coleman; he understood all about it, and it was the first time I knew of the sale.

Q. I ask you if you sent your son to find out what your interest in the property was?

A. No, sir; he's always in delicate health—sick.

Q. Didn't Mr. Castell go and look after these notes?

A. That is not until everything was over.

134 Q. I ask you if Mr. Castell didn't go to make inquiries about those notes at your request?

A. Not at my request. I went down to his place on other business.

Q. At whose instance did you go?

A. Well, he said he would go.

Q. Did you ever request Mr. Castel to make any inquiries about those notes?

A. Not as I remember.

Q. Did you ever give him the notes in his hands?

A. I don't think he ever got the notes in his hands.

Q. Did you ever show them to him?

A. He seen them there with Paddy Irwin.

Q. What were you showing the notes to Paddy Irwin for?

A. When I got my husband's life insured. I had—I intended bringing them down to Mr. Castel and he didn't like it because I didn't report this to him before, and Paddy Irwin took the notes and looked at them.

Q. What did he say?

A. He said they were not worth over 50 cents on the dollar; somebody else was there and said they wasn't any account.

Q. Didn't he say why they were worth only 50 cents on the dollar?

A. He said Paul Cook & Co. had gone in bankruptcy, as far as I understood.

135 Q. Did he say anything about that property having been sold?

A. No, sir.

Q. Did you or did you not ever offer to take half of the value of your notes?

A. No, sir.

Q. What did Mr. Archer do for you?

(Objected to as irrelevant; objection sustained.)

Q. Can you read?

A. No, sir.

Q. Not at all?

A. No, sir.

Q. Of course you can't write?

A. No, sir.

Q. Are you in the habit of having the newspapers read to you?

A. No, sir; not much.

Q. Did you ever have them read to you?

A. Well I did, but I never paid much attention to them, because I had plenty of other things to do.

Q. Do you know when the sale of this sugar refinery of Paul Cook & Co. took place?

A. I don't remember.

Q. Did you hear it read from the papers?

A. No, sir; I heard it outside among the people.

Q. Did you hear anything about the sale that was to take place of this sugar refinery by virtue of an order of the U. S. dist. court in bankruptcy?

A. Not until after it was over.

136 Q. How long after?

A. It might be a week after it was sold.

Q. Now who bought at the sale?

A. Well, I can't tell who bought at the sale, because I knew nothing about the sale.

Q. Do you know whether you were interested in the purchase?

A. No, sir; I wasn't interested in the purchase.

Q. Are you sure of that?

A. I am confident of it.

Q. Did not Marshall J. Smith or Thomas A. Archer, or either one of them, or both of them, inform you that that sugar refinery that was purchased by the Factors' & Traders' Insurance Company was sold for your and other creditors' account and benefit?

A. No, sir.

Q. Or words to that effect?

A. No, sir.

Q. Did you have any conversation with them to that effect, or in substance to that effect?

A. No, sir; I hadn't.

Q. Have you heard Marshal J. Smith testify here on the last occasion when this case was fixed?

A. I heard him say things that I never heard before until I heard it here.

Q. Did you hear him say that he had talked to you and informed you of the sale?

A. No, sir; he never informed me or talked to me.

137 Q. Did you hear him say so?

A. I did hear him say so.

Q. Was he in the habit of visiting your house or you his house?

A. I visited at his house; sometimes he came over there, but he came very little. After the sale, whenever I inquired after the note he got angry and he turned the thing some other kind of a way. I never could get any satisfaction, except what I got from Mr. Coleman.

Q. Were you in possession of the notes at the time?

A. Of course I was.

Q. Had he not explained to you several times the condition in which those notes were?

A. No, sir; he didn't.

Q. How comes it that you were in possession of the notes since 1870, and you remained quiet for 6 long years?

A. I didn't remain quiet.

Q. What did you do?

A. I tried and asked & enquired for it for to sell the notes. I inquired for somebody to buy the notes.

Q. Did you remain silent for six long years?

A. I did not. I have been inquiring all the time, for I wanted money, and I went to Mr. Smith's sometime—I believe in February, if I recollect—and I told him I wanted him to get me some money
138 on the notes—he told me he would go and see some other parties;
I can't understand what he said, whether it was the party or Mr. Archer—and to come around to-morrow and see him and I didn't see him again or speak to him a word until I spoke to him in court—until the other day.

Q. Is it usual to hold on to notes such a long time and then try to sell them?

A. I don't know Mr. Coleman tried.

Q. Why did'nt you try to collect the notes?

A. Where would I collect the notes. I didn't know nothing. I enquired and I didn't find anybody, and then I placed them in the hands of the gentleman to collect.

By Mr. COLEMAN:

Q. You placed them in the hands of an attorney for collection?

A. Yes, sir; I placed them in your hands and since that I never had any more trouble about it.

By Mr. HALL:

Q. You heard the testimony of Mr. Archer given here some two weeks ago, that he had called upon you several times before and after the sale and that you had called upon him?

A. And when was the sale? I never heard tell of *of* the sale until Mr. Coleman told me about it lately.

139 Q. Did you try to find Mr. Paul Cook & Co., the man who made the note?

A. No, sir. I heard of the sale, but long after.

Q. Did you hear Mr. Archer's testimony when he stated that he called upon you before the sale?

A. No, sir.

Q. After the sale did Mr. Archer call upon you, telling you what had taken place?

A. No, sir.

Q. Did you call upon him?

A. When his wife sent for me the time he was sick, but there was no word about anything then.

Q. You stated you heard about this sale about one week after the sale?

A. At the time he bought it.

Q. Who did you go to see?

A. I didn't see nobody—I kept quite. They told me my notes was good for my money.

Q. Who?

A. Mr. Smith.

Q. Did you talk to Mr. Archer?

A. No, sir. I went to see Mr. Archer on other business at his office on Gravier street, and then I asked him to sell the notes.

Q. What is that other business?

A. Well, I wanted to get the papers for the money spent on my husband's real estate; that's got nothing to do with it; I wanted to get the tax-bills & papers.

140 Q. When did you first hear of this sale?

A. About a week after they bought it.

Q. I thought you testified awhile ago that you never heard anything of the sale until Mr. Coleman told you?

A. At the time it was sold the second time. I never heard it until Mr. Coleman told me.

Q. Who told you?

A. I heard the people talking and I didn't mind it; the notes was what I had; that was good for my money.

Q. Did you hear that on the street; or at your house?

A. At my house.

Q. Who was talking about it?

A. Well, my children talked about it.

Q. Where did they say they heard of it?

A. I suppose they seen it in the papers. I am not sure where they heard it.

Cross-examination waived.

James Murphy sworn for plaintiff.

Q. You are the son of the plaintiff in this suit?

A. Yes, sir.

Q. You are the gentleman referred to by Mr. Archer and Mr. Smith when they spoke of the son of Mrs. Murphy having arrived at the age of majority?

A. Yes, sir.

Q. When did you arrive at the age of majority?

141 A. On the 27th of November, 1872.

Q. Have you attended to your mother's business since then?

A. Yes, sir.

Q. Do you hold the power of attorney of your mother?

A. Yes, sir.

Q. Is that the power of attorney of your mother? (Document "G" shown to witness.)

A. Yes, sir.

(Plaintiff offers in evidence power of attorney marked "G" to show that the gentleman was authorized to represent his mother.

Objected to as irrelevant; objection overruled.)

Q. On the 20th of June, 1873, were you in possession of the notes sued on in this case?

A. Yes, sir.

Q. How long prior to that have you held those notes?

A. Sometime before the 25th of January, I believe.

Q. You got those notes from Marshall J. Smith & Co.?

A. Yes, sir; from Mr. Archer.

Q. After you received those notes from Mr. Archer in January, 1873, did they ever leave your possession?

A. No, sir; not until I gave them to you.

Q. Did Mr. Archer ever have these notes after that?

A. No, sir.

Q. Did any one else ever have those notes after that date?

A. No, sir.

142 Q. Did your mother ever state to you anything that would lead you to believe that she ever had any knowledge of the sale or transfer of this property?

(Objected to.)

A. Not that I recollect.

Q. As the agent of your mother, have you had any control over these notes since you received them from Mr. Archer?

A. Yes, sir; I think so.

Q. What have you done with the notes; have you offered them for sale?

A. I brought them one time to Mr. Archer with ma, to see if he could sell them for her; he tried, but no one would buy them.

Q. Has that been since what date?

A. It's a little over a year ago.

Q. Did Mr. Archer take *take* those notes from you at the time he tried to sell them?

A. He didn't have the notes; I didn't give the notes to him.

Q. He stated to you, however, that he had tried to sell the notes?

A. Yes, sir.

Cross-examination by Mr. EGAN:

Q. Did Mr. Archer ever tell you that your mother was a part owner of the sugar refinery?

A. No, sir.

Q. Did he ever tell your mother so in your presence?

143 A. No, sir; not that I recollect.

Q. Did Marshall J. Smith ever tell you or your mother so?

A. No, sir.

Q. Did either one of them ever explain to you or your mother the interest she had in the sugar refinery of Paul Cook & Co.?

A. No, sir; he never told ma that he invested the money in this refinery.

Q. Who was it told you that?

A. Mr. Smith.

Q. When did he tell you that?

A. That was shortly after, in 1870 some time.

Q. Did he tell you that, or your mother?

A. That was in 1871, the year after he told it to ma. Both of us were present.

Q. Do I understand you to mean by that that he had bought the sugar refinery for the notes?

A. We didn't know exactly where the money was invested; he told ma that he had invested the money.

Q. Did he not tell you or your mother that Paul Cook & Co. had gone into bankruptcy?

A. No, sir.

Q. Do you know what bankruptcy means?

A. Yes, sir.

Q. What does it mean?

A. Where persons fail to pay their debts—are not able to pay their debts.

144 Q. Do you know whether Paul Cook & Co. went into bankruptcy?

A. I knew it after.

Q. You have no doubt of it?

A. No, sir; I have no doubt about it.

Q. Don't you know that their estate was sold in bankruptcy by order of the bankrupt court?

A. No, sir.

Q. Did Mr. Archer explain to you after this sale that your mother owned part of that sugar refinery?

A. No, sir.

Q. Did he explain the interest your mother had in that sugar refinery?

A. Not that I recollect.

Q. You heard his testimony given here some two weeks since?

A. Yes, sir.

Q. When he called on you and your mother, and when you were at his office, and he explained to you and your mother the condition of the property?

A. I remember his testimony.

Q. He testified that he explained clearly the condition of the property to you and your mother. Do you say that he didn't?

A. I heard him say so here; but he never explained anything about it.

Q. What did he say about the notes there?

A. He said he would always say it was a mixed-up affair; that
145 he was sorry about it, and he wished he never had anything to
do with it; that is all he said about it.

Q. What is your present occupation?

A. Nothing.

Q. You have got no occupation?

A. No, sir.

Q. Have you ever been engaged in any business?

A. No, sir.

Q. You are certain Mr. Archer never made any explanation to you or to your mother, in your presence, in regard to the condition of this property after the sale by the bankrupt court?

A. Yes, sir; ma asked him, & he said that it was a mixed-up thing; that he was sorry the money was put into it, and he told ma she had the notes; that was all she needs.

Q. Why didn't you collect from Paul Cook & Co.? You knew they were bankrupts?

A. Yes, sir; I knew that they were bankrupts.

Certificate of registry of privilege of Lagan & Mackison.—Offered in evidence by defendant.—Filed June 26th, 1876.

MRS. MARY MURPHY
vs. } No. 7255.
FACTORS' & TRADERS' INS. CO. & ALS.

By affidavit before Geo. W. Saddler, first justice of the ,
146 dated 8th of July, 1870, M. D. Lagan, of the firm of Lagan &

Mackison, who being duly sworn, deposed and said that the firm of Paul Cook & Co are justly ard truly indebted unto Lagan & Mackison in the full sum of $3,443.17 for labor and materials to the Orleans Refinery, as per account annexed to said affidavit.

New Orleans, July 8th, 1870.

(Signed) "C. DARCANTEL, *D'y.*

I, the undersigned, deputy recorder of mortgages in and for the parish of Orleans, State of Louisiana, do hereby certify that the foregoing is a true & correct transcript from the records of my office, as recorded in book No. 89, folio 264, on the eighth day of July, A. D. 1870.

New Orleans, May 26th, 1876.

[SEAL.] (Signed) C. DARCANTEL, *D'y R'r.*

Document E.—Certificate of registry of privilege of Leeds & Co.—Offered in evidence by defendant.—Filed June 26th, 1876.

MRS. MARY MURPHY
vs.
FACTORS' & TRADERS' INS. CO. & ALS. } No. 7255.

Messrs. Paul Cook & Co. Bought of Leeds & Co., iron founders, 1870, June 30th. 147 Altering vacuum pan, repairing and altering boiler, making & brushing & chimney and erecting do.; labor of mechanics at refinery; 2 centerfugals, with additions to do.; pulleys, hangers, chafting, couplings, boxes, and bearings for do.; iron frames for window; washers, plates, bolts, wheels; pipes & fittings for do.; boiler-iron rivets, plange brass work, and repairing machinery generally	$14, 118 06
By cash a/c	5, 500 00
Balance	8, 618 06

We hereby certify that the above account is correct, and that the articles and labor, as specified above, was furnished on Orleans Refinery.

(Signed) PAUL COOK & CO.

Sworn to and subscribed this 6th day of July, 1870, before me.

(Signed) JOHN P. MONTAMAT,
3rd Justice of the Peace.

NEW ORLEANS, *July 6th*, 1870.

Privilege.

(Signed) C. DARCANTEL, *D'y.*

I, the undersigned, deputy recorder of mortgages in and for the parish of Orleans, State of Louisiana, do hereby certify that the foregoing is a true and correct transcript from the records of my office, as recorded in book No. 89, folios 258 & 259, on the sixth day of July, A. D. 1870.

New Orleans, May 25th, 1876.

[SEAL.] C. DARCANTEL, *De'y.*

148 *Document F.—Offered in evidence by defendant.—Filed June 26th, 1876.*

MRS. MARY MURPHY
vs.
FACTORS' & TRADERS' INS. CO. & ALS. } No. 7255.

ADJUDICATION OF BANKRUPTCY UPON DEBTOR'S PETITION.

The district court of the United States for the district of Louisiana.

In the matter of Paul Cook & Co. & Justus Vairin, jr., ind'ly and as members of the firm of Paul Cook & Co., by whom a petition for adjudication in bankruptcy was filed on the 21st day of February, A. D. 1871, in said court in bankruptcy, No. 1113.

At New Orleans, in said district, on the 21st day of February, 1871, before C. S. Kellogg, one of the registers of said court in bankruptcy, I, the undersigned, a register of said court in bankruptcy, upon good proof before me taken, do find that the said firm of Paul Cook & Co. and Paul Cook and Justus Vairin, jr., ind'y, have become bankrupts within the intent and meaning of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2d, 1867; and I do hereby declare and adjudge them bankrupts accordingly.

(Signed) C. S. KELLOGG,
Register in Bankruptcy.

149 True copy.
(Signed) C. S. KELLOGG,
Register in Bankruptcy.

Order confirming order to homologate resolutions, &c.—Extracts from minutes of June 20th, 1871.

United States district court, district of Louisiana, May term, A. D. 1871.

NEW ORLEANS, *Tuesday, June 20th,* 1871.

Present, his honor E. H. Durell, judge.

IN THE MATTER OF PAUL COOK & CO., BANKRUPTS. } No. 1113. In bankruptcy.

The bankrupt proceedings in this case having been transferred to Marshall J. Smith, trustee, to conduct said proceedings as trustee under a board of directors elected by the creditors who had proved their claims at the first meeting, the said directors being Leeds Greenlief, C. Kohn, and Hermane Doane, and the court having, by its order of the 12th instant, directed the costs incurred to be paid, and the costs being—

Randolph & Hughes, att'ys' fees	$1,000 00
E. E. Norton, register	1,000 00
Clerk's costs	43 70
Marshal's costs	53 21
Register's costs	104 00

And it appearing that the said costs have been paid by the said creditors and trustee,

150 It is ordered that the decree herein made on 12th inst., authorizing the said proceedings to be carried on by a trustee and committee of creditors, be confirmed, the condition on which the same was made having been complied with.

Resolutions of creditors under sec. 43.—*Filed May* 31*st*, 1871, *at* 10 *a. m.*

In the district court of the United States for the district of Louisiana.

IN THE MATTER OF PAUL COOK & J. VAIRIN, BANKRUPTS. } In bankruptcy.

At this meeting of the creditors of said bankrupts, called specially by order of said court, for the purpose of determining in what manner the estate of said bankrupts shall be settled, it was resolved by three-fourths in value of the creditors whose claims have been proved, as follows:

1st. That it is for the interest of the general body of the creditors of said Vairin & Cook that the estate of said Cook & Vairin, bankrupts, should be wound up and settled, and distribution made among the creditors by trustees, under the inspection and direction of a committee of creditors.

2nd. That this resolution be certified and reported to the court.

3rd. That Marshall J. Smith be nominated as trustee, to take, hold, and distribute said estate.

151 4th. That Carl Kohn, Leeds Greenlief, esq., and Harmon Doane, of New Orleans, be the committee of the creditors, under whose direction the said trustees shall act.

C. Kohn	12,458	00
David Steuart	1,077	62½
Ed. D. Seghers	798	00
Lagan & Mackison	3,443	17
J. S. Aitkens & Son	582	01
John Hennessey	1,053	12
pp. Leeds & Co., Leeds Greenlief	86	95
McCloskey, Bigby & Co	6,012	00
Henry Braning	600	00
Oliver Peirer	2,769	04
Marshall J. Smith & Co	7,487	10
Samuel Jamison	2,871	89
Reserving all mortgage rights—Marshall J. Smith & Co.		
Chaffraix & Agar	4,307	69
Reserving special mortgage—R. Gibson, att'y for Factors' & Traders' Insurance Co.		
Mary Bruning, "tutrix"	2,244	41

Affidavit of bankrupts.

Cook & Vairin, said bankrupts, being duly sworn (or affirmed), says that the names of the persons affixed to the foregoing resolution represent three-fourths in value of all his creditors whose claims have been proven against his estate.

(Signed) PAUL COOK,
(") JUSTUS VAIRIN, JR.

152 Subscribed and sworn to before me this 30th day of May, A. D. 1871.

(Signed) C. S. KELLOGG,
Register in Bankruptcy.

In the district court of the United States for the district of Louisiana, in bankruptcy, at New Orleans, the 30th day of May, A. D. 1871.

I hereby certify that at a meeting of the creditors of said bankrupts held this day, in pursuance of a notice regularly given, it being the first meeting of creditors, according to the provisions of the act of Congress, &c., approved March 2d, 1867, the above resolution was adopted and signed by three-fourths in value of the creditors of said bankrupts who were present or represented at said meeting.

(Signed) C. S. KELLOGG.
Register in Bankruptcy.

Motion to sell estate of bankrupts.—Filed December 1st, 1871.

United States district court. In bankruptcy.

BANKRUPTCY OF PAUL COOK AND JUSTUS Vairin, individually, &c. } No. 1113.

On motion of Randolph, Singleton & Browne, of counsel for Marshall J. Smith, trustee herein, and upon filing the written resolution of the committee selected by the creditors of the bankrupts to inspect and direct the settlement of the estate of said bankrupts, directing the trustee to sell the property of the bankrupts surrendered 153 by them, known as the Orleans Sugar Refinery, together with all the machinery, property, and appurtenances therein and thereto belonging, a detailed description of which is hereto appended,

It is ordered that the same be sold, free of incumbrances, reserving the rights of the priviledged creditors to the funds in the trustees' hands, at public auction, by W. Irving Hodgson, auctioneer, after thirty days' advertisement, on the following terms, viz:

One-third cash; balance on credit of one and two years, with eight per cent. interest from date until paid; property insured to be kept insured by the purchaser, and policy transferred to the holder of the notes given for the purchase-price, with five per cent. attorneys' fees in case of suit; all secured by the act of sale.

NEW ORLEANS, *Nov. 20th,* 1871.

W. J. SMITH, Esq., *Trustee:*

DEAR SIR: The Orleans Refinery, located in square bounded by Commerce, Delord, Peters, and Calliope st's, has a frontage on Commerce of 290 feet; on Calliope of 30 feet; on Peters of 60 feet—all, more or less, measuring, in all, some 26,000 square feet of area.

There is on the premises—
One building, 40 by 40 feet—6 stories.
One do. 40 " 100 " 4 "
One do. 40 " 100 " 2 do.
154 One building, 20 by 45 feet—for filters.
One shed 24 " 60 " 2 stories.
One do. 66 " 110 " 1 story.
One low-pressure engine—160 horse-power. (Can be run high or low.)

One doctor-engine, with molasses, liquor, water, and vapor pumps.

One donkey-engine, with water force-pump.

One upright engine for elevators.

Two double fluid-boilers, 32 feet long and 42 inches diameter, with large steam drum connected.

One marine boiler, 72 inches in diameter, with 13 flues.

Two copper-lined receiving-tanks for said molasses, connected with blow-ups; capacity 200 bb's.

Two open copper pans and worm for experimenting.

Twenty-six iron molasses-coolers, holding 13 bbls. each, and 16 wooden do., or sugar, holding 20 bbls. each.

Two iron draw-off tanks, holding 225 bbls. each.

Two bone-black kilns; capacity for burning 30,000 pounds per day of 24 hours.

Sixteen iron filters, 4½ feet in diameter and 18 feet high.

One clarifier and two settling tanks, for molasses or sugar to be filtered.

Three iron tanks and two wooden do., for water (in attic).

One sweet-water copper-lined tank over clarifier.

155 Six iron tanks, holding 65 bbls. each, for filtered liquor, sweet water, or molasses.

One iron vacuum-pan, with 490 feet 2½-inch copper worm, holding 60 bbls.

One heater, with steam-jacket.

Four centrifugals (Minck's pattern).

One hundred thousand pounds of bone-black, more or less.

Six hundred sugar molds, more or less.

The connections are made with copper and iron pipes, and are complete. The engines and boilers are in good working order.

The two copper-lined receiving-tanks for said molasses are a good deal worn, but with some little repairs wi*th* answer probably for two or three years.

The iron blow-up for said molasses is about worn out, and not worth the repairing.

A pump of larger capacity than the one now used would be necessary for raising water to the condenser in case the vacuum-pan should be worked. With the named exceptions, I believe the machinery and apparatus for reboiling molasses and refining molasses and sugar are in good condition.

The buildings generally are in good order, excepting the shed fronting on Peters street, which leaks badly, and should be recovered immediately.

Respectfully yours,

(Signed) PAUL COOK.

156 OFFICE OF MARSHALL J. SMITH & CO.,
New Orleans, , 187 .

Resolved that Marshall J. Smith, trustee of the creditors of Paul Cook & Co., in bankruptcy, *de* directed to advertise for sale the property surrendered by said bankrupts, known as the Orleans Sugar Refinery, together with all the machinery, property, and appurtenances therein and thereto belonging.

(Signed) C. KOHN.
(") LEEDS GREENLEAF.
(") H. DOANE.

Petition & order to confirm sale.—Filed June 21st, 1873.

United States district court, district of Louisiana.

IN THE MATTER OF PAUL COOK & CO., BANKRUPTS. } In bankruptcy. No. 1113.

Marshall J. Smith, trustee, on an application to confirm sale made under and in virtue of a decree of this hon. the United States district court, La., respectfully showing unto your honor the said trustee exhibits herewith all the proceedings taken to effect a sale of the property in the accompanying deed, all of which conform to law and to various orders touching the sale thereof issued from this court.

Wherefore the said trustee, making a copy of said part of this petition, pray the hon. court to confirm and homologate said sale and proceedings.

(Signed) RANDOLPH, SINGLETON & BROWNE.

157 Let the prayer of this petition be granted and the sale confirmed.

June 21st, 1873.

(Signed) E. H. DURELL, *Judge.*

United States district court, district of Louisiana.

CLERK'S OFFICE.

I certify that the foregoing 15 pages do form and contain a true and full transcript of the originals on file and of record in the matter of Paul Cook and Julius Vairin, jr., individually and as members of the firm of Paul Cook & Co., numbered 1113, in bankruptcy, on the docket of our said court.

In faith whereof I have hereunto set my hand & seal of said court, at New Orleans, in said district, this 26th day of June, A. D. 1876.

[SEAL.] (Signed) J. A. CHARBONNET, *D'y Clerk.*

Document G.—Procuration from Mrs. Mary Murphy to James J. Murphy.—Filed June 26th, 1876.

MRS. MARY MURPHY *vs.* FACTORS' & TRADERS' INS. CO. } No. 7255.

STATE OF LOUISIANA,
Parish of Orleans, City of New Orleans:

By this instrument of procuration, be it known that on this 158 sixteenth day of January, in the year of our Lord one thousand eight hundred and seventy-three, and of the Independence of the United States of America the ninety-seventh, before me, William Joseph Castell, a notary public in and for the parish of Orleans, State of Louisiana, duly commissioned and qualified, personally came and appeared Mrs. Mary Newitt, widow of the late James Murphy, of this city, who declared that she had made & appointed, and does by these presents make, nominate, ordain, authorize, constitute, & appoint, and in her place and stead depute and put her son, James Joseph Murphy, also of this city, to be her true and lawful attorney in fact, general and special,

giving and by these presents granting unto the said attorney full power and authority for her, and in her name and behalf and to her use, to conduct, manage, and transact all and singular her affairs, business, and concerns in New Orleans of whatever nature or kind, without any exception or reservation whatsoever; to open all letters of correspondence addressed to her and to answer the same; to make and endorse promis'ory notes in the name of constituent, and draw, endorse, and accept bills of exchange; to make checks and draw money out of any bank or banks wherein the same may have been deposited in the name or for account of constituent; to deposit drafts, bills of exchange, acceptances, and promissory
159 or other obligations for collection in any bank or banks, and
withdraw the same, or the amount thereof, at pleasure, by check or otherwise; to sell and transfer all or any shares of the capital stock of any bank or banks, or other corporate body or bodies, owned by constituent, and receive and receipt for the dividends due or to become due thereon; to pledge and pawn all or any shares of the capital stock of any bank or banks, or other corporate body or bodies, owned by the said constituent; to make and give any note or notes which may be necessary from time to time for the renewal of the same; to attend all or any meetings of creditors wherein the said constituent may be interested, and vote in her name on all questions and cases that may be submitted to such meetings; to attend all or any meetings of the stockholders of any bank or banks, or other corporate body or bodies, wherein the said constituent may be interested, and vote in the name of constituent on all the questions and cases that shall or may be submitted at such meeting; to borrow money from any bank or banks, or other monied institution or institutions, on the notes or obligations of the said constituent, drawn by her or by the said attorney, or those of others which shall or may come into the hands of the said attorney, for the use of the said constituent, and make other notes or obligations from time to time for the renewal of all such
160 or any part or parts thereof; to sell, transfer, and convey, or to
mortgage, and affect all or any part or parts of the real, personal, or mixed estate of the said constituent, and to receive the price thereof; also to purchase real, personal, or mixed estate in the name of said constituent, on such terms and conditions as the said attorney shall think fit, and to lease, let, or hire all or any part of the real estate belonging to the said constituent, and receive and receipt for the rent thereof, as the same shall fall due; and for the full execution of the purposes aforesaid, to make, sign, and execute, in the name of the said constituent, all acts whether of sale, mortgage, lease, release, contract, compromise, covenant, and agreement, or otherwise, that may be requisite or necessary, and bind the said constituent thereby as firmly as if the same were or had been her own proper acts and deeds; to sign all bonds or other acts required by the revenue department at the custom-house of this district or elsewhere, and to do all the custom-house business whatever; to receive and attend to all shipments or consignments of produce, goods, wares or merchandise, that shall or may be made to constituent, either for her own account and risk, or that of others, and to pursue the instructions of the owners, shippers or others interested therein relative thereto; to receive and acknowledge notices of
161 protest of all or of any bills, drafts or promissory notes to which
the said constituent may be a party, and to act for the said constituent, and be her substitute in all cases wherein she may be appointed the agent or attorney of others, and to ask, demand, have,

take, and by all lawful ways and means to recover and receive of and from all and every person and persons whomsoever, body or bodies corporate, all & every such sum or sums of money, goods, debts, property, and effects whatsoever, as now is *or now* or may hereafter be in his, her, or their custody or possession, due, owing, coming or belonging to her, the said constituent, whether by bond, bill, note, book-debt, account, consignment, bequest, or for and by what other reason or means soever; and to that end with whom it may concern to adjust and settle all accounts, and upon recovery and receipt in the premises to make and give good and sufficient discharges and acquittances; to appear before all courts of law and equity, there to so prosecute and defend as occasoin shall require, or to compromise, compound and agree in the premises, by arbitration or otherwise, as the said attorney shall in his discretion think fit; also to apply for and obtain all and any attachments, requisitions, injunctions and appeals, give the requisite security, and sign the necessary bonds.

162 And generally to do and perform all and every other act, matter and thing whatsoever as shall or may be requisite and necessary touching or concerning the affairs, business, and concerns of the said constituent as fully, amply, & effectually, and to all intents and purposes with the same validity as if all and every such act, matter, or thing were or had been herein particularly stated and especially provided for, or as she, the said constituent, could or might do if personally present; also with full power of substitution and revocation, and said constituent hereby agrees to ratify and confirm all and whatsoever the said attorney shall lawfully do or cause to be done by virtue of this act of procuration.

Thus done and passed in my office at New Orleans aforesaid the day, month, and year first above written, in the presence of James A. Luther and Denis J. Lacy, witnesses of lawful age, domiciliated in this city, who hereunto sign their names with said appearer and me, the said notary, after the reading of these presents.

Before the signing of these presents Mrs. Mary Murphy declared that she was illiterate and did not know how to write he' name, but made her usual mark to stand therefor.

(Signed) MARY $\overset{\text{her}}{\underset{\text{mark.}}{+}}$ MURPHY.

JAMES A. LUTHER.
D. J. LACY.

W. J. CASTELL,
Notary Public.

163 I certify the above and foregoing to be a true copy of the original act extant in my current registry.

In faith whereof I grant these presents, under my signature and the impress of my seal of office.

New Orleans, 17th January, 1873.

[SEAL.] (Signed) W. J. CASTELL,
Not. Public.

"Order: Case submitted."—Extract from the minutes, June 26th, 1876.

MRS. MARY MURPHY
vs.
FACTORS' & TRADERS' INS. CO. & ALS. } No. 7255.

This cause came on this day for trial—J. D. Coleman, for plaintiff;

Gibson & Gibson, Rouse & Grant, Singleton & Browne, B. Egan, and G. L. Hall, for defendants & warrantors.

When, after hearing further evidence, and by consent of counsel, in open court, said cause being submitted, the court took the same under advisement, with leave to the parties to file briefs to-morrow evening before adjournment of court.

"*Judgment.*"—*Filed June 21st*, 1876.

MRS. MARY MURPHY
vs.
FACTORS' & TRADERS' INS. CO. & ALS. } No. 7255.

164 Fifth district court, &c.

In this case, for the reasons this day orally assigned, the court, considering the law and the evidence to be in favor of plaintiff, Widow Mary Murphy, and against defendant, The Factors' & Trader's Insurance Co.—

It is ordered, adjudged, and decreed that there be judgment in favor of Widow Mary Murphy and against The Factors' & Traders' Ins. Company, for the sum of twenty thousand dollars, with eight per cent. per annum interest from March 21st, 1871, until paid, with 5 % attorneys' fees on said sum of twenty thousand dollars, as fixed by the act of mortgage, and with special mortgage on the following described property:

Fourteen lots of ground, situated in the first district of this city in square bounded by Pearl, Louisa, New Levee, and Delord streets, and designated as lots No. six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, nineteen, twenty, twenty-one, and twenty-two, on a plan drawn by C. F. Zimbel, on the 10th of March, 1855, deposited in the office of W. Y. Lewis, late a notary public in this city.

Lots No. seven, eight, & nine measure each twenty feet eleven inches
front on Pearl street by ninety-six feet eight inches in depth; lots
165 No. ten, eleven, and twelve measure each twenty feet eleven inches
front on Pearl street, by ninety-six feet eleven inches in depth. Lot No. thirteen measures twenty-one feet front on *on* Pearl street, by one hundred and five feet eight inches in depth on the division line of lots No. twelve and nineteen; thence on the rear line running towards Pearl street twenty-eight feet, where it forms a point; thence from said point towards Delord street about five feet until it intersects the division line of lot No. fourteen; thence on said division line about eighty-five feet to the place of beginning. Lot No. nineteen measures twenty feet eleven inches front on the rear division line of lot No. twelve, about forty feet on the division line of lot No. twenty, about thirty-six feet on the division line of property formerly belonging to S. J. Peters, and about nine feet on the line of lot No. thirteen. Lot No. fourteen having twenty-one feet front on Pearl street by eighty-five feet in depth on one side and ninety feet in depth on the other side and twenty feet in width in the rear. Lot No. fifteen, having thirty-six feet front on Pearl street, about ninety feet on the line of lot No. fourteen; thence on the rear line towards Delord street, about twenty-nine feet; thence on a line towards Pearl street, about forty-six feet; thence on a line parallel with the rear line, twenty-nine feet eight
inches; thence to the place of beginning, fifty feet six inches.
166 Lot no six measures twenty-nine feet five inches, and five lines

front on Louisa street, by eighty-four feet five inches, and five lines in depth and front on Pearl street, and lots No. twenty, twenty-one, and twenty-two adjoin each other and measure, together, sixty-three feet one inch; and six lines front on New Levee street sixty-two feet nine inches in width, in the rear one hundred and twelve feet four inches and three lines in depth on the division line of lot No. nineteen, and one hundred and four feet ten inches and four lines on the division line of lot No. 23.

Together with all the buildings and improvements on said lots of ground known as the Orleans Refinery, and all the machinery, engines, and appurtenances thereunto belonging.

It is further ordered, adjudged, and decreed that the mortgage on said afore-described property, to the extent of the interest which the defendant, the Factors' & Traders' Ins. Co., may have had by virtue of its ownership of the two notes of the same series as those held and owned by plaintiff Widow Mary Murphy, and herein sued upon, is extinguished by confusion, and that plaintiff's mortgage on said afore-described property, to secure said debt due her, with interest, attorneys' fees, and costs, is hereby recognized and decreed to be in full force and effect.

167 It is further ordered, adjudged, and decreed that the defendant, The Factors' & Traders' Ins. Co., be condemned to pay to the plaintiff Widow Mary Murphy the sum of twenty thousand dollars, with 8 % per annum interest from March 21st, 1871, until paid; 5 % attorneys' fees on said sum of twenty thousand dollars, as fixed by the act of mortgage, and all costs, or deliver up the said afore-described property, together with all the buildings and improvements, and all the machinery, engines, and appurtenances thereunto belonging, and which were specially mortgaged in the act of mortgage herein filed as part of the plaintiff's petition, to be sold to pay the said debt, interest, attorneys' fees, and costs.

It is further ordered, adjudged, and decreed that the claims and demands herein made and set up by the defendant, The Factors' & Traders' Ins. Co., in its answer, and also those made by Leeds & Co., Lagan & Mackison, John Hennessey, and T. A. Archer, herein called by the defendant, The Factors' & Traders' Ins. Co., be rejected and dismissed.

It is further ordered that plaintiff's suit as against Marshall J. Smith, trustee, be dismissed, and that the exception of E. E. Norton, assignee, herein submitted by counsel, be maintained, and plaintiff's suit as to said E. E. Norton, assignee, be dismissed.

Judgment rendered June 28th, 1876.
Judgment signed July 3rd, 1876.
(Signed) E. NORTH CULLOM, *Judge.*

168 *Rule for a new trial.—Filed nunc pro tunc July 1st, 1876.*

MRS. MARY MURPHY,
vs.
FACTORS' & TRADERS' INS. CO. } No. 7255.

Fifth district court.

On motion of Gibson & Gibson, attorneys for Factors' & Traders' Insurance Company, and upon suggesting to the court the judgment was rendered in this case on the 28th of June, 1876, and that they were aggrieved thereby:

It is ordered by the court that plaintiff show cause on
whey a new trial should not be granted upon the following grounds, to wit:

That the judgment is contrary to the law and the evidence in this—

1st. That it was shown by the evidence that T. A. Archer acted as the agent of Mrs. Mary Murphy, plaintiff herein, and that she was bound by his acts.

2nd. That plaintiff's was a concurrent mortgagee, and was entitled only to her proportionate share of the proceeds of the sale of said property.

3rd. That the property was sold at public auction by order of court free of incumbrances, and that plaintiff should have recourse to the proceeds.

169 The undersigned counsel agree that the above shall be embodied in the transcript of appeal as the motion for new trial in above suit & in lieu of the one lost.

(Signed) J. D. COLEMAN.
(Signed) GIBSON & GIBSON.

Order: Rule dismissed.—Extract from the minutes July 3rd, 1876.

MRS. MARY MURPHY
vs.
FACTORS' & TRADERS' INS. CO. } No. 7255.

Fifth district court for the parish of Orleans.

In the matter of the rule herein taken on the 1st instant, for a new trial, the court seeing no reasons to change its opinion herein, as heretofore expressed,

It is ordered that said rule be dismissed.

Petition of appeal of the Factors' and Traders' Insurance Co.—Filed July 11th, 1876.

MRS. MARY MURPHY
vs.
FACTORS' & TRADERS' INS. CO. & AL. } No. 7255.

Fifth district court for the parish of Orleans.

The petition of the Factors' & Traders' Ins. Co., a corporation organized under the laws of Louisiana, and one of the defendants in the above-entitled cause, respectfully represents:

170 That the' are aggrieved by the judgment herein rendered on the 28th day of June, and signed on the 3rd day of July, 1876, and are desirous of a suspensive appeal therefrom to the supreme court of the State.

Wherefore they pray that a suspensive appeal from the above judgment be granted them, returnable to the honorable the supreme court of the State, on the 1st Monday of November, 1876, upon furnishing bond with good and solvent security, conditioned according to law, and as the law directs, and that Mrs. Mary Murphy, C. J. Leeds & Co., Lagan & Mackison, John Hennessey, and T. A. Archer, be duly cited to answer this appeal, and for the fullest relief in law and equity.

(Signed) GIBSON & GIBSON,
Att'ys for F. & T. Ins. Co.

Order.

Let a suspensive appeal be granted herein, made returnable to the supreme court of Louisiana on the first Monday of November, 1876, upon petitioners' furnishing bond with good and solvent security, in the sum of forty-five thousand dollars, conditioned as the law directs.

New Orleans, 11th July, 1876.

(Signed) A. L. TISSOT,
Jud'e of the Second District Court for the Parish of Orleans,
171 *acting in lieu of the Hon. E. North Cullom,*
Judge, absent from this Parish.

Bond of appeal of the Factors' and Traders' Ins. Co.—Filed July 11th, 1876.

MRS. MARY MURPHY
vs. No. 7255.
FACTORS' & TRADERS' INS. CO. & ALS.

Know all men by these presents that we, the Factors' & Traders' Insurance Company, as principal, and R. M. Walmsby as surety, are held and firmly bound unto Thomas Duffy, clerk of the fifth district court for the parish of Orleans, his successors, executors, administrators, and assigns, in the sum of forty-five thousand dollars, for the payment whereof we bind ourselves, our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated in the city of New Orleans, on this 11th day of July, in the year of our Lord one thousand eight hundred and seventy-six.

Whereas the above-bounded Factors' & Traders' Insurance Company have this day filed a petition of appeal from a final judgment rendered against them in the suit of Mrs. Mary Murphy vs. Factors' & Traders' Ins. Co., No. 7255, in the fifth district court for the parish of Orleans, on the 28th day of June, 1876, and signed on the 3d day of July, 1876:

172 Now the condition of the above obligation is such that the above-bound Factors' & Traders' Insurance Company shall prosecute their suspensive appeal, and shall satisfy whatever judgment may be rendered against them, or that the same shall be satisfied by the proceeds of the sale of their estate, real or personal, if they be cast in the appeal; otherwise, that the said R. M. Walmsley shall be liable in their place.

ED. A. PALFREY. [SEAL.]
President Factors' & Traders' Ins. Company.
(Signed) R. M. WALMSLEY. [SEAL.]

Signed, sealed, & delivered in the presence of—

Petition for the suspensive appeal on behalf of Leeds & Co.—Filed July 14th, 1876.

MRS. MARY MURPHY
vs. No. 7255.
FACTORS' AND TRADERS' IN. CO. & AL.

Fifth district court, parish of Orleans.

To the hon. the judge of the fifth district court, for the parish of Orleans:

The petition of Leeds & Co., a commercial firm located and doing business in this city, respectfully show that they are a party to the above-entitled cause, and that as such a final judgment has been 173 rendered against them, from which they cannot be relieved except by an appeal to the supreme court of this State, and that they are desirous to appeal suspensively from the judgment rendered against them.

Wherefore, petitioner pray this honorable court to grant them a suspensive appeal on furnishing the requisite bond and security, and that this court would fix the amount of the appeal bond and the return day of said appeal, and that all the parties to the above-entitled cause be duly cited to answer this appeal, and for general relief.

(Signed) SINGLETON & BROWNE,
Att'ys for Leeds & Co.

Order.

Let a suspensive appeal be granted herein, made returnable to the supreme court for the State of Louisiana on the first Monday in November, 1876, upon petitioner furnishing bond with good and solvent security, conditioned as the law directs.

New Orleans, 14 July, 1876.

(Signed) A. L. TISSOT,
Judge of the Second District Court, acting in lieu of the Honorable E. North Cullom, absent from this parish.

174 *Bond of appeal on behalf of Leeds & Co.—Filed July 14th, 1876.*

MRS. MARY MURPHY
vs.
FACTORS' & TRADERS' INS. CO. & ALS. } No. 7255.

Know all men by these presents that we, Leeds & Co. as principals, and Henry Rennysen as surety (living 149 Annunciation street), are held and firmly bound unto Thomas Duffy, clerk of the fifth district court, for the parish of Orleans, his successors, executors, administrators, and assigns, in the sum of four hundred dollars, for the payment whereof we bind ourselves, our heirs, executors, and administrators, firmly by these presents, sealed with our seals and dated in the city of New Orleans on this 14th day of July, in the year of our Lord one thousand eight hundred and seventy-six.

Whereas the above-bounded Leeds & Co. this day filed a petition of appeal from a final judgment rendered against them in the suit of Mrs. Mary Murphy vs. Factors' & Traders' Insurance Company et als., No. 7255, in the fifth district court, for the parish of Orleans, on the 28th June, 1876, and signed on the 3d day of July, 1876.

Now the condition of the above obligation is such that the above-bound Leeds & Co. shall prosecute their appeal and shall satisfy 175 whatever judgment may be rendered against them, or that the same shall be satisfied by the proceeds of the sale of their estate, real or personal, if they be cast in the appeal; otherwise, that the said Henry Rennyson shall be liable in their place.

(Signed) LEEDS & CO. [SEAL.]
" H. RENNYSON. [SEAL.]

Petition of appeal on behalf of Percy Roberts, assignee.—Filed July 18th, 1876.

WIDOW MARY MURPHY
vs.
FACTORS' & TRADERS' INS'CE CO. & ALS. } No. 7255.

To the honorable fifth district court, for the parish of Orleans:

The petition of Percy Roberts, assignee of the firm of Lagan & Mackison, in bankruptcy, called in warranty in this cause, respectfully represent that petitioner is informed and believes that there is error to his prejudice in the final judgment rendered in the above cause on the 28th June, 1876, and signed on the 3d July, 1876; that he is aggrieved by said final judgment and is desirous of taking an appeal therefrom to the honorable supreme court of the State of Louisiana.

Wherefore petitioner prays that he be allowed an appeal from the above judgment to the supreme court of the State of Louisiana, on giving bond and security, conditioned according to law, in a sum to 176 be fixed by the court, and that Mary Murphy, plaintiff in this cause, Leeds & Co., and the Factors' & Traders' Ins'ce. Co. be cited to appear and answer this appeal, and petitioner prays for general relief.

(Signed) BENTINCK EGAN, *Att'y.*

Order.

Let a suspensive appeal be granted herein as prayed for, upon petitioner furnishing bond with good and solvent security, conditioned as the law directs, said appeal to be made returnable to the supreme court of Louisiana on the first Monday of November, 1876.

New Orleans, 18th July, 1876.

(Signed) A. L. TISSOT,
Judge of the Second District Court, acting in lieu of the Hon. E. North Cullom, absent from this parish.

Bond of appeal on behalf of Percy Roberts, assignee, &c.—Filed July 19th, 1876.

WIDOW MARY MURPHY
vs.
FACTORS' & TRADERS' INS'CE CO. & ALS. } No. 7255.

Know all men by these presents that we, Percy Roberts, assignee of Lagan & Mackison, as principal, and I. S. Marsdon, as surety, 177 are held and firmly bound unto Thomas Duffy, clerk of the fifth district court, for the parish of Orleans, his successors, executors, administrators, and assigns, in the sum of one hundred dollars, for the payment whereof we bind ourselves, our heirs, executors, and administrators, firmly by these presents, sealed with our seals and dated in the city of New Orleans on this 19th day of July, in the year of our Lord one thousand eight hundred and seventy-six.

Whereas the above-bounded Percy Roberts, assignee of Lagan & Mackison, this day filed a petition of appeal from a final judgment rendered against him in the suit of Mary Murphy vs. Factors' and Traders' Insurance Company, No. 7255, in the fifth district court, for the parish of Orleans, on the 28th day of June, 1876, and signed on the 3d day of July, 1876:

Now, the condition of the above obligation is such that the above-bound Percy Roberts, assignee of Lagan & Mackison, shall prosecute his appeal, and shall satisfy whatever judgment may be rendered against him, or that the same shall be satisfied by the proceeds of the sale of his estate, real or personal, if he be cast in the appeal; otherwise, that the said I. S. Marsden shall be liable in his place.

(Signed) PERCY ROBERTS,
Assignee of Lagan & Mackison,
By his att'y, B. EGAN.
(Signed) I. S. MARSTON.

178 *Bill of exceptions of defendant.—Filed July 24th,* 1876.

WIDOW MARY MURPHY
vs.
FACTORS' & TRADERS' INS'CE CO. & ALS. } No. 7255.

Fifth district court, parish of Orleans.

Be it remembered, that on the trial of this case in open court, defendants offered to prove by E. A. Palfrey, a witness for defendants, on the stand, that in order to effect a sale of said property of Paul Cook & Co., bankrupts, and for taxes due the State of Louisiana and the city for repairs, watching, and other necessary expenses on said property, that the said Factors' and Traders' Insurance Company had disbursed the following sums, viz:

1°. Costs of court, attorneys' fees, auctioneers' fees, &c., three thousand eight hundred and forty-seven $\frac{05}{100}$ dollars.	$3,847 05
2°. Taxes, State and city, three thousand one hundred & fourteen $\frac{65}{100}$	3,114 65
3°. Repairs, seven hundred and sixty-eight $\frac{13}{100}$	768 13
4°. Watchman, two thousand six hundred	2,600 00
5°. Trustee of Paul Cook & Co., in bankruptcy, one thousand one hundred and twenty-five	1,125 00
Making a total of eleven thousand four hundred & fifty-four $\frac{83}{100}$ dollars	$11,454 83

179 To the introduction of this evidence counsel for plaintiff objected, on the ground that the defendant the Factors' & Traders' Insurance Company occupy no better position than a debtor holding property encumbered with plaintiff's mortgage containing the "*pact de non alienando*," and cannot set up any defense that the debtor could not and cannot make proof of any expenditures or charges to the prejudice of plaintiff's mortgage, which objection being sustained by the court, defendants, through their counsel, take this their bill of exceptions to the ruling of the court, and ask that the same may be signed.

(Signed) E. NORTH CULLOM, *Judge.*

Bill of exceptions of defendants.—Filed July 24th, 1876.

WIDOW MARY MURPHY
vs. } No. 7255.
FACTORS' & TRADERS' INS'CE CO. & ALS.

Fifth district court, for the parish of Orleans.

Be it remembered that, on the trial of this cause in open court, Thomas A. Archer, a witness for defendants, being on the stand, the following question was propounded to him by counsel for defendants: "Will you state what took place at the meeting you have referred to? There was an agreement entered into to buy the Orleans Sugar Refinery."
180 Which question and answer were objected to by counsel for plaintiff, on the ground that it was "res inter alios acta," which objection being sustained by the court, defendants, through their counsel, take this their bill of exceptions to the ruling of the court, and pray that the same may be signed.

(Signed) E. NORTH CULLOM, *Judge.*

Bill of exceptions of defendants.—Filed July 24th, 1876.

WIDOW MARY MURPHY
vs. } No. 7255.
FACTORS' & TRADERS' INS'CE CO. & ALS.

Fifth district court, parish of Orleans.

Be it remembered that on the trial of this cause in open court, that Thomas A. Archer, a witness for defendants, being sworn and on the witness stand, defendants proposed to prove by him that at the time of the sale described in the plaintiff's petition, as also alleged and set up in defendants' answer, he was the agent of Mrs. Mary Murphy, the plaintiff herein.

That in the purchase of the property, and in everything that was done concerning it, he acted with the full knowledge and approval of Mary Murphy, the plaintiff herein; that she was aware of the
181 purchase and intention to purchase it at the bankrupt sale for the benefit of the parties referred to in defendants' answer, and assented and agreed to it; that after it was done she was apprized of it, and assented to it, and ratified every act over and over again. That she had conferences with Mr. Thomas A. Archer, as her agent and attorney-in-fact in the matter; that she was kept advised throughout the whole of every steps that was taken, and ratified and approved the same by her assent.

Also that he acted in no other capacity; that the description contained in the act as acting as liquidator of the firm of Marshall J. Smith & Co. was incorrect, that it was an improper description and erroneous, and that he acted solely therein as the representative of the interests of Mrs. Mary Murphy, the plaintiff, and that Marshall J. Smith & Co. had no claim whatever, privilege, or mortgage against Paul Cook & Co., or the property sold, and that it was well known to Mrs. Murphy the interest she had in the property as described in defendants' answer, and approved it.

Which testimony was objected to by counsel for plaintiff, on the ground that it is an effort to prove an agency to sell immovable property by parol and to contradict a written act of sale offered in evidence.

182 The court rules that the objections are well taken to all that transpired before and at the time of passing the act, and well taken as to the insuffiency of the evidence of agency on the part of Mr. Archer, it not being in writing, and so professed. The court interposes no authoritative objection to the introduction of evidence to show that after the passage of the act Mrs. Murphy, with a full knowledge of the contents of the act, gave her assent.

To which ruling of the court defendants excepted and tendered this their bill of exceptions, and pray that the same may be signed.

(Signed) E. NORTH CULLOM, *Judge.*

Bill of exceptions of defendants.—Filed July 24th, 1876.

WIDOW MARY MURPHY
vs.
FACTORS' & TRADERS' INS'CE. CO. & ALS. } No. 7255.

Fifth district court, &c.

Be it remembered that on the trial of this cause, in open court, Thomas A. Archer, a witness for defendants, being on the witness stand, was asked by counsel for defendants the following question: "Mr. Archer, who did those various parties represent in this transaction, the parties you have just named?" (Referring to a meeting of

183 the mortgage and privilege creditors of Paul Cook & Co.) Answer. Mr. Harmon Doane represented the Factors' & Traders' Insurance Company; he was the president; Mr. Leeds Greenleaf, the firm of Leeds & Co; Mr. Logan, of the firm of Lagan & Mackison; and Thos. A. Archer represented Mrs. Mary Murphy." Which was objected to by counsel for plaintiff on the ground that it was an attempt to prove an agency concerning real estate by parole; which objection being sustained by the court on the ground that if parties desire to bind Mrs. Murphy on account of the agency of Mr. Archer in any matter relative to real estate, of title thereto, the agency must be in writing.

To which ruling of the court defendants, through their counsel, excepted, and tender this their bill of exceptions to the court to be signed.

(Signed) E. NORTH CULLOM, *Judge.*

Bill of exceptions of plaintiff.—Filed July 27th, 1876.

WIDOW MARY MURPHY
vs.
FACTORS' & TRADERS' INS'CE CO. & ALS. } No. 7255.

Fifth district court, parish of Orleans.

To the honorable the fifth district court, for the parish of Orleans:

184 Be it remembered that on the trial of this cause on its merits, on Monday, June 12, 1876, defendant, by his counsel, proposed to show by parole proof that the plaintiff, Widow Mary Murphy, after the act of sale had been passed, and with a full knowledge of its contents, gave her assent thereto, and confirmed and ratified the acts of Thomas A. Archer, and for purposes of such parole proof called to the witness

stand and had sworn and examined Thomas A. Archer, Marshall J. Smith, W. J. Castell, E. A. Palfrey, Leeds Greenleaf, Widow Mary Murphy, to which parole proof counsel for plaintiff objected on the grounds:

1°. That plaintiff not being a party to the act of sale, she could not confirm or ratify it, and proof of ratification of an act by one not a party thereto could not be received.

2°. That ratification and confirmation of an authentic act of sale of immovable property could not be shown by parole proof, and that such proof was inadmissible.

The court overruled the objections made by plaintiff's counsel, and allowed the witnesses to be examined, to which ruling of the court counsel for plaintiffs reserved this, his bill of exceptions; which, after being first exhibited to counsel for defendants, is hereby respectfully tendered to the court for signature.

(Signed) E. NORTH CULLOM, *Judge.*

185 *Certificate.*

STATE OF LOUISIANA:

Fifth district court, for the parish of Orleans.

I, Thomas Duffy, clerk of the fifth district court, for the parish of Orleans, do hereby certify that the foregoing two hundred & forty-three (243) pages contain a full and complete transcript of all the proceedings had, testimony and evidence adduced, and all the documents filed upon the trial of the case wherein Mrs. Widow Mary Murphy is plaintiff, and Factors' and Traders' Insurance Company and others are defendants, the same being numbered No. 7255 of the docket of our said court.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court, at the city of New Orleans, this twenty-fifth day of August, in the year of our Lord one thousand eight hundred and seventy-six, and in the one hundred and first year of the Independence of the United States.

[SEAL.] (Signed) THOMAS DUFFY, *Clerk.*

186 UNITED STATES OF AMERICA,
State of Louisiana:

Supreme court of the State of Louisiana.

Citation of appeal and return.—Filed 31 *July,* 1876.

MARY MURPHY
v. } No. 7255. 5 D. C.
FACTORS' & TRADERS' INS. CO.

Petition and citation of appeal to be served on Lagan & Mackison;
Singleton & Browne, att'ys.

THE STATE OF LOUISIANA:

Fifth district court, for the parish of Orleans.

To Mr. Logan & Mackison, greeting:

Whereas J. Leeds & Co. have, on the 14th day of July, filed in the office of the clerk of the fifth district court, for the parish of Orleans, a petition of appeal from a certain final judgment rendered in the said court against them, which appeal is returnable in the supreme court for the State aforesaid on the first Monday in November, 1876:

You are therefore hereby cited to appear in person or by attorney in the said court on the day last aforesaid to answer the said appeal.

Witness the honorable A. L. Tissot, acting in lien of the Hon. E. N. Cullom, judge of the court, absent from this parish aforesaid, this 14th day of July, in the year of our Lord one thousand eight hundred and seventy-six.

187 [SEAL.] (Signed) THOMAS DUFFY, *Clerk.*

Return.

Rec'd July 21, 1876, and on the same day, month, and year I served a copy of the within accompanying petition and citation of appeal on Lagan & M'ckison by leaving the same in the hands of James Mackison, one of the firm, in person. Ret. same day. She'ff's fees, $2.00.

(Signed) JOHN GAFFNEY,
D'y She'ff.

Citation of appeal and return.—Filed 31 *July*, 1876.

MARY MURPHY
v.
FACTORS' & TRADERS' INS. CO. } No. 7255. 5 D. C.

Pet. & cit. of appeal to be served on Marshal J. Smith, trustee, &c.; Singleton & Browne, att'ys.

THE STATE OF LOUISIANA:

Fifth district court, for the parish of Orleans.

To Mr. Marshal J. Smith, trustee, &c., greeting:

Whereas J. Leeds & Co. have, on the 14th day of July, filed in the office of the clerk of the fifth district court, for the parish of Orleans, a petition of appeal from a certain final judgment rendered in the said court against them, which appeal is returnable in the supreme court for the State aforesaid on the first Monday in November, 1876.

188 You are, therefore, hereby cited to appear, in person or by attorney, in the said court, on the day last aforesaid, to answer the said appeal.

Witness the honorable A. L. Tissot, acting in lieu of the Hon. E. N. Cullom, judge of the court, absent from this parish aforesaid, this 14th day of July, in the year of our Lord one thousand eight hundred and seventy-six.

[SEAL.] (Signed) THOMAS DUFFY, *Clerk.*

Received July 21, 1876, and on the 22d day of the same month and year I served a copy of the within citation and petition of appeal on Marshal J. Smith, trustee, &c., in person.

Sh'ff' fee, $2.00. Ret'd same day.

(Signed) J. McCANTS, *D'y Sh'ff.*

Citation of appeal and return.—Filed 31 *July*, 1881.

MARY MURPHY
v.
FACTORS' & TRADERS' INS. CO. } No. 7255. 5 D. C.

Pet. & cit. of appeal to be served on the Factors' and Traders' Ins. Co.;
Singleton & Browne, att'ys.

THE STATE OF LOUISIANA:

Fifth district court, for the parish of Orleans.

To the Factors' & Traders' Ins. Co., greeting:

Whereas J. Leeds & Co. have on the 14th day of July filed in the office of the clerk of the fifth district court, for the parish of Or- 189 leans, a petition of appeal from a certain final judgment rendered in the said court against them, which appeal is returnable in the supreme court for the State aforesaid on the first Monday in November, 1876:

You are, therefore, hereby cited to appear, in person or by attorney, in the said court, on the day last aforesaid, to answer the said appeal.

Witness the honorable A. L. Tissot, acting in lieu of the Hon. E. N. Cullom, judge of the court, absent from this parish aforesaid, this 14th day of July, in the year of our Lord one thousand eight hundred and seventy-six.

[SEAL.] (Signed) THOMAS DUFFY, *Clerk.*

Rec'd July 21, 1876, and on the 22nd day of the same month and year I served a copy of the within citation and accompanying petition of appeal on the Factors' and Traders' Insurance Company, defendant herein, at the place of business, # 37 Carondelet street, through E. A. Palfrey, president, in person. Returned same day.

Sh'ff' fee, $2.00.

(Signed) J. McCANTS, *D'y Sh'ff.*

Citation of appeal and return.—Filed 31 *July*, 1881.

MRS. MARY MURPHY
v.
FACTORS' & TRADERS' INS. CO. ET ALS. } No. 7255. 5th district court.

Gibson & Gibson, att'ys.

190 Petition of appeal to be served on Mrs. Mary Murphy.

THE STATE OF LOUISIANA:

Fifth district court, for the parish of Orleans.

To Mrs. Mary Murphy, greeting:

Whereas Factors' and Traders' Insu'nce Company has on the 11th day of July filed in the office of the clerk of the fifth district court, for the parish of Orleans, a petition of appeal from a certain final judgment rendered in the said court against her, which appeal is returnable in the supreme court for the State aforesaid on the first Monday of November, 1876:

You are therefore hereby cited to appear, in person or by attorney, in the said court, on the day last aforesaid, to answer the said appeal.

Witness A. L. Tissot, judge of the second district court, acting in lieu of the honorable E. North Cullom, judge of the court aforesaid, this 12th day of July, in the year of our Lord one thousand eight hundred and seventy-six.

[SEAL.] (Signed) THOMAS DUFFY, *Clerk.*

Received July 12th, 1876, and on the 14th day of the same month and year I served a copy of the within citation and accompanying petition of appeal on Mrs. Mary Murphy, through J. D. Coleman, attorney in fact, in person. Returned same day.

Sh'ff' fee, $2.00.

(Signed) J. McCANTS, *D'y Sh'ff.*

191 *Citation of appeal and return.—Filed* 31 *July,* 1881.

MARY MURPHY
v. } No. 7255.
FACTORS' & TRADERS' INS. COMPANY.

Petition and citation of appeal to be served on Mrs. Mary Murphy; B. Egan, attorney.

THE STATE OF LOUISIANA:

Fifth district court, for the parish of Orleans.

To Mrs. Mary Murphy, greeting:

Whereas Mr. Percy Roberts has on the 18th day of July filed in the office of the clerk of the fifth district court, for the parish of Orleans, a petition of appeal from a certain final judgment rendered in the said court against him, which appeal is returnable in the supreme court for the State aforesaid on the first Monday in November, 1876:

You are, therefore, hereby cited to appear, in person or by attorney, in the said court, on the day last aforesaid, to answer the said appeal.

Witness the honorable A. L. Tissot, acting in lieu of the Hon. E. M. Cullom, judge of the court, absent from this parish aforesaid, this 18th day of July, in the year of our Lord one thousand eight hundred and seventy-six.

[SEAL.] (Signed) F. A. LUMINAIS, *D'y Clerk.*

192 Received July 20, 1876, and on the 27th July, 1876, I served a copy of within citation and accompanying petition of appeal on Mrs. Mary Murphy, thro' J. D. Coleman, attorney, in person. Returned same day.

Sh'ff's fees, $2.00.

(Signed) S. E. CROZAT, *D'y Sh'ff.*

Citation of appeal and return. Filed 31 *July*, 1881.

MARY MURPHY
v. } No. 7255. 5 D. C.
FACTORS' & TRADERS' INS. CO.

Petition and citation of appeal to be served on Mary Murphy; Singleton & Browne, attorneys.

THE STATE OF LOUISIANA:

Fifth district court, for the parish of New Orleans.

To Mrs. Mary Murphy, greeting:

Whereas J. Leeds & Co. have, on the 14th day of July, filed in the office of the clerk of the fifth district court, for the parish of Orleans, a petition of appeal from a certain final judgment rendered in the said court against them, which appeal is returnable in the supreme court for the State aforesaid on the first Monday in November, 1876:

You are therefore hereby cited to appear, in person or by attorney, in the said court, on the day last aforesaid, to answer the said appeal.

Witness the honorable A. L. Tissot, act. in lieu of the Hon. E. N. Cullom, judge of the court, absent from this parish aforesaid, this 14th day of July, in the year of our Lord one thousand eight hundred and seventy-six. 193

[SEAL.] (Signed) THOMAS DUFFY, *Clerk.*

Received July 21, 1886, and on the 24th day of same month and year I served the within citation and accompanying copy of petition of appeal on Mary Murphy, through Jas. D. Coleman, esq., attorney, in person. Returned same day.

Sh'ff' fees, $2.00.

(Signed) S. E. CROZAT, *D'y Sh'ff.*

Citation of appeal and return.—Filed 31 *July*, 1881.

MARY MURPHY
v. } No. 7255. 5 D. C.
THE TRADERS' & FACTORS' INS. CO.

Petition and citation of appeal to be served on the Factors' and Traders' Insurance Company; B. Egan, attorney.

THE STATE OF LOUISIANA:

Fifth district court, for the parish of New Orleans.

To the Factors' and Traders' Insurance Company, greeting:

Whereas Percy Roberts has on the 17th day of July filed in the office of the clerk of the fifth district court, for the parish of Orleans, a petition of appeal from a certain final judgment rendered in the said court against him, which appeal is returnable in the supreme court for the State aforesaid on the first Monday in November, 1876:

194 You are therefore hereby cited to appear, in person or by attorney, in the said court, on the day last aforesaid, to answer the said appeal.

Witness the honorable A. L. Tissot, acting in lieu of the Hon. E. N. Cullom, judge of the court, absent from this parish aforesaid, this eighteenth day of July, in the year of our Lord one thousand eight hundred and seventy-six.

[SEAL.] (Signed) F. A. LUMINAIS, *D'y Clerk.*

Received July 20, 1876, and on the 22nd day of the same month and year I served a copy of the within citation and accompanying petition of appeal on the Factors' and Traders' Insurance Company, at their office, # 37 Carondelet street, through E. A. Palfrey, president, in person. Returned same day.

Sh'ff' fee, $2.00.

(Signed) J. M. CANTS, *D'y Sheriff.*

Citation of appeal and return.—Filed 31 *July,* 1876.

5th district court.

MRS. MARY MURPHY
v.
FACTORS' & TRADERS' INS. CO. ET ALS. } No. 7255.

Gibson & Gibson, att'ys.

Petition of appeal to be served on C. J. Leeds & Co.

THE STATE OF LOUISIANA:

Fifth district court, for the parish of Orleans.

To Mess. C. J. Leeds & Co., greeting:

Whereas Factors' and Traders' Insurance Company et als. has
195 on the 11th day of July filed in the office of the clerk of the
fifth district court of New Orleans a petition of appeal from a certain final judgment rendered in the said court against her, which appeal is returnable to the supreme court for the State aforesaid on the first Monday in November, 1876:

You are therefore hereby cited to appear, in person or by attorney, in the said court, on the day last aforesaid, to answer the said appeal.

Witness A. L. Tissot, judge of the second district court, acting in lieu of the honorable E. North Cullom, judge of the court aforesaid, this 12th day of July, in the year of our Lord one thousand eight hundred and seventy-six.

[SEAL] (Signed) THOMAS DUFFY, *Clerk.*

Received July 12, 1876, and on the 13th day same month and year I served a copy of the within citation and petition of appeal on C. J. Leeds & Co., by leaving the same at their office, corner Delord and Constance streets, in the hands of Leeds Greenleaf, bookkeeper and agent of said firm by power of attorney, all the members of said firm being absent at the time of said service. Returned same day.

Sh'ff's fees, $2.00.

(Signed) S. W. SCOTT,
Deputy Sheriff.

196 *Citation of appeal and return.—Filed* 31 *July*, 1876.

5th dist. court.

MRS. MARY MURPHY,
v. } No. 7255.
FACTORS' & TRADERS' INS. CO., ET ALS.
Gibson & Gibson, atty's.

Petition of appeal to be served on Lagan and Mackinson.

THE STATE OF LOUISIANA:

Fifth district court, parish of Orleans.

To Mess. Lagan & Mackison, greeting:

Whereas Factors' and Traders' Insurance Company et als. has on the 11th day of July filed in the office of the clerk of the fifth district court, for the parish of Orleans, a petition of appeal from a certain final judgment rendered in the said court against her, which appeal is returnable in the supreme court for the State aforesaid on the first Monday of November, 1876.

You are therefore hereby cited to appear in person or by attorney, in the said court, on the day last aforesaid, to answer the said appeal.

Witness A. L. Tissot, judge of the second district court, acting in lieu of the honorble E. North Cullom, judge of the court aforesaid, this 12th day of July, in the year of our Lord one thousand eight hundred and seventysix.

[SEAL.] (Signed) THOMAS DUFFY, *Clerk.*

Received July 12, 1878, and on the 13th day, same month and
197 year, I served a copy of the within citation and petition of ap-
peal on Lagan & Mackison thro' Jas. Mackison, one of said firm, in person. Returned same day.

Sh'ff's fees, $2.00.

(Signed) S. W. SCOTT, *D'y Sh'ff.*

Citation of appeal and return.—Filed 31 *July*, 1876.

5th district court.

MRS. MARY MURPHY
v. } No. 7255.
FACTORS' & TRADERS' INS. CO. ET ALS.
Gibson & Gibson, att'ys.

THE STATE OF LOUISIANA:

Fifth district court, for the parish of Orleans.

To Mr. T. A. ARCHER, greeting:

Whereas Factors' and Traders' Insurance Company et als. has on the 11th day of July filed in the office of the clerk of the fifth district court, for the parish of Orleans, a petition of appeal certain from a certain final judgment rendered in the said court against her, which appeal is returnable in the supreme court, for the State aforesaid, on the first Monday of November, 1876.

You are therefore hereby cited to appear in person or by attorney, in said court, on the day last aforesaid, to answer the said appeal.

Witness A. L. Tissot, judge of the second district court, acting in lieu of the honorable E. North Cullom, judge of the court aforesaid, this 12th day of July, in the year of our Lord one thousand eight hundred and seventy-six.

[SEAL.] (Signed) THOMAS DUFFY, *Clerk.*

198 *Petition of appeal to be served on T. A. Archer.*

Received July 12, 1876, and on the 13th day same month and year I served a copy of the within citation and petition of appeal on T. A. Archer in person.

Returned same day.

Sh'ff's fee, $2.00.

(Signed) S. W. SCOTT, *D'y Sh'ff.*

Citation of appeal and return.—Filed 31' *July*, 1876.

MRS. MARY MURPHY
v.
FACTORS' & TRADERS' INS. CO. } No. 7255. 5 D. C.

Petition and citation of appeal to be served on J. Leeds & Co. B. Egan, attorney.

THE STATE OF LOUISIANA:

Fifth district court, for the parish of Orleans.

To Mr. J. LEEDS & Co., greeting:

Whereas Mr. Percy Roberts has, on the 18th day of July, filed in the office of the clerk of the fifth district court, for the parish of Orleans, a petition of appeal from a certain final judgment rendered in the said court against him, which appeal is returnable in the supreme court, for the State aforesaid, on the first Monday in November, 1876.

You are, therefore, hereby cited to appear in person, or by attorney, in the said court, on the day last aforesaid, to answer the said appeal.

199 Witness the honorable A. L. Tissot, acting in lieu of the Hon. E. N. Cullom, judge of the court, absent from this parish aforesaid, this 18th day of July, in the year of our Lord one thousand eight hundred and seventy-six.

[SEAL.] (Signed) F. A. LUMINAIS, *D'y Clerk.*

Received July 20, 1876, and on the 21st day of the same month and year I served a copy of the petition and citation of appeal on Leeds & Co. by leaving the same in the hands of C. J. Leeds, one of the firm of said Leeds & Co., in person.

Returned same day.

Sh'ff fees, $2.00.

(Signed) JOHN GAFFENY, *D'y Sh'ff.*

Citation of appeal and return.—Filed 31 *July*, 1876.

MRS. MARY MURPHY
v. } No. 7255. 5th district court.
FACTORS' & TRADERS' INS. CO. ET. ALS.

Gibson & Gibson, attorneys.

Petition of appeal to be served on John Hennessey.

THE STATE OF LOUISIANA:

Fifth district court of New Orleans.

To Mr. John Hennessey, greeting:

Whereas Factors' and Traders' Insurance Company et als. has, on the 11th day of July, filed in the office of the clerk of the fifth district court of New Orleans a petition of appeal from a certain final 200 judgment rendered in the said court against her, which appeal is returnable in the supreme court for the State aforesaid on the first Monday of November, 1876.

You are, therefore, hereby cited to appear in person or by attorney in the said court on the day last aforesaid to answer the said appeal.

Witness A. L. Tissot, judge of the second district court, acting in lieu the honorable E. North Cullom, judge of the court aforesaid, this 12th day of July, in the year of our Lord one thousand eight hundred and seventy-six.

[SEAL.] (Signed) THOMAS DUFFY, *Clerk.*

Received July 12, 1876, and on the 19th day of July, 1876, I served a copy of within citation and accompanying petition of appeal on John Hennessey, defendant herein, by leaving same at his domicile, No. 119 St. Mary street, in the hands of his wife, Mary Hennessey, a person apparently over 14 years of age, living and residing at said domicile, said John Hennessey being absent at time of said service, all of which facts I ascertained by interrogating said Mary Hennessey.

Returned same day.

Sh'ff's fee, $2.

(Signed) BEN. C. MIRE, *D'y Sh'ff.*

201 *Citation of appeal and return.—Filed* 31, *July*, 1876.

MARY MURPHY
v. } No. 7255. 5 D. C.
FACTORS' & TRADERS' INS. CO.

Petition and citation to be served on T. A. Archer. Singleton & Browne, attorney.

THE STATE OF LOUISIANA:

Fifth district court, for the parish of Orleans.

To Mr. T. A. ARCHER, greeting:

Whereas, J. Leeds & Co., have, on the 14th day of July, filed in the office of the clerk of the fifth district court for the parish of Orleans, a petition of appeal from a certain final judgment rendered in the said court against them, which appeal is returnable in the supreme court, for the State aforesaid, on the first Monday in November, 1876.

You are, therefore, hereby cited to appear in person or by attorney in the said court on the day last aforesaid to answer the said appeal.

Witness the honorable A. L. Tissot, acting in lieu of the Hon. E. N. Cullom, judge of the court absent from this parish aforesaid, this 14th day of July, in the year of our Lord one thousand eight hundred and seventy-six.

[SEAL.] (Signed) THOMAS DUFFY, *Clerk.*

202 Received July 21, 1876, and on the 24th day of same month and year, I served a copy of the within citation and accompanying petition of appeal on T. A. Archer in person. Returned same day.

She'ff' fees, $2.00.

(Signed) JOHN GAFFNEY,
Deputy Sheriff.

Citation of appeal and return.—Filed 30 *October*, 1876.

MARY MURPHY
v.
FACTORS' AND TRADERS' INS. CO. } No. 7255. 5 D. C.

Petition and citation of appeal to be served on Percy Roberts, assignee, etc. Singleton & Browne, attorneys.

THE STATE OF LOUISIANA:

Fifth district court, for the parish of Orleans.

To Mr. Percy Roberts, assignee, &c., greeting:

Whereas J. Leeds & Co. have, on the 14th day of July, filed in the office of the clerk of the fifth district court, for the parish of Orleans, a petition of appeal from a certain final judgment rendered in the said court against them, which appeal is returnable in the supreme court for the State aforesaid on the first Monday in November, 1876.

You are therefore hereby cited to appear in person or by attorney in the said court, on the day aforesaid, to answer the said appeal.

203 Witness the honorable A. L. Tissot, acting in lieu of the Hon. E. N. Cullom, judge of the court, absent from this parish aforesaid, this 14th day of July, in the year of our Lord one thousand eight hundred and seventy-six.

[SEAL.] (Signed) THOMAS DUFFY, *Clerk.*

Received July 21, 1876, and on the 20th day of October, 1876, I served a copy of the within citation and accompanying copy of petition of appeal on Mr. Percy Roberts, assignee, &c., in person. Returned same day.

Sh'ff' fees, $2.00.

(Signed) S. E. CROZAT,
Deputy Sheriff.

TRANSCRIPT OF APPEAL NO. 6399.—FILED NOVEMBER 3RD, 1876.

Supreme court of Louisiana.

(Signed) M. P. JULIAN, *Deputy Clerk.*

Motion to dismiss of F. & T. Ins. Co., No. 1.—*Filed* 9 *November*, 1876.

In the supreme court.

MRS. MARY MURPHY
v.
THE FACTORS' TRADERS' INS. CO. ET ALS.
No. 6399.

To the honorable the supreme court for the State of Louisiana:

Now into this honorable court comes Mrs. Mary Murphy,
204 plaintiff in the above-entitled and numbered cause, and moves
to dismiss the appeal herein taken by the Factors' and Traders'
Insurance Company on the ground, viz:

That your mover has not been cited to answer the appeal herein taken by said appellant, the Factors' and Traders' Insurance Company, as requir' by law, and that the failure to cite your mover is attributable to the fault and negligence of said appellant.

Mover annexes as part hereof sheriff's return on citation filed in this honorable court on July 31st, 1876.

(Signed) JAMES DAVID COLEMAN,
Attorney for Appellee, Mrs. Mary Murphy.

Motion to dismiss appeal of F. & T. Ins. Co., No. 2.—*Filed November* 9*th*, 1876.

In the supreme court.

MRS. MARY MURPHY
v.
THE FACTORS' & TRADERS' INS. CO.
No. 6399.

Now into this honorable court comes Mrs. Mary Murphy, plaintiff
and appellee herein, and hereby specially reserving all her rights in the
motion to dismiss (No. 1) hereinbefore filed, and in no manner waiving
any of the rights secured to her therein by law, and only in the event
that said aforesaid motion is denied by this honorable court, she
205 moves to dismiss the appeal herein taken by The Factors' and
Traders' Insurance Company on the following grounds, viz:

First. Because one of the original defendants and vendor of the real estate mortgaged to plaintiff herein (and the sale of which is sought to be annulled by The Factors' and Traders' Insurance Company, appellant), viz, Marshal J. Smith, trustee, is a necessary party, and without whom the honorable court cannot pronounce on the issues made by said appellant, and he (Marshal J. Smith, trustee), has not been made a party to the petition of appeal herein filed by said appellant (record, pp. 223, 224), and has not been cited to answer the same, and that said neglect is attributable solely to the fault of said appellant.

(Signed) JAMES D. COLEMAN,
Attorney for Mrs. Mary Murphy, Appellee.

Motion to dismiss appeal of Leeds & Co. and Percy Roberts, assignee.—Filed 9 November, 1876.

In the supreme court.

MRS. MARY MURPHY
v. } No. 6399.
THE FACTORS' & TRADERS' INS. CO. ET ALS.

To the honorable the supreme court for the State of Louisiana:

Now into this honorable court comes Mrs. Mary Murphy, plaintiff
206 in the above-entitled suit, and moves to dismiss the appeals herein
taken by Charles J. Leeds & Co. and Percy Roberts, assignee
of Lagan & Mackison, on the ground, viz:

That mover has not been cited to answer the appeals by them herein taken, as the law requires, and the fault is attributable to appellants.

Mover makes part hereof sheriff's returns on citations of appeal herein filed July 31st, 1876.

(Signed) JAMES DAVID COLEMAN,
Attorney for Mrs. Murphy, Appellee.

And now reserving all rights in the motion to dismiss hereinabove set forth, and in no manner waiving any of her rights therein, and only in the event that the same should be denied by this honorable court, she moves to dismiss the appeals herein taken by Charles J. Leeds & Co. and Percy Roberts, assignee of Lagan & Mackison on the following grounds, viz:

First. Because the appeals by them taken are from portions of judgment separate and distinct from that rendered against the Factors' and
Traders' Insurance Company, by whom they are made appellees. Each
of them filed separate and distinct petition and bond and order
207 for appeal and they not being original parties to the suit above
entitled, they cannot, in the absence of mover's consent which
was never sought nor given, escape the obligation imposed upon them by law of prosecuting their appeal separately and distinct.

Second. Because there is no clerk's certificate as required by law, the one attached to the record herein (record, p. 244) has in no manner reference to, nor identify with the appeals taken by Leeds & Co. and Lagan & Mackison, who were not original defendants.

Third. As to the appeal taken by Percy Roberts, assignee of Lagan & Mackison, because Marshal J. Smith, trustee, a necessary party, is not made a party to the petition of appeal filed by said appellant Percy Roberts, assignee, and he is not cited, which is attributable solely to the fault of said appellant.

(Signed) JAMES DAVID COLEMAN,
Attorney for Mary Murphy, Appellee.

Answer of E. E. Norton, assignee.—Filed 15 *November*, 1876.

Supreme court of the State of Louisiana.

MRS. MARY MURPHY
v. } No. 6399.
FACTORS' INSURANCE CO. ET ALS.

Now comes into court E. E. Norton, assignee, by his counsel,
108 and joins in the appeal and prays that the judgment of the lower

court so far as it affects this appearer be affirmed with all costs and for general relief.

(Signed) ROUSE & GRANT,
Attorneys for E. E. Norton, Assignee.

Answer of M. J. Smith, trustee.—Filed 15 *November*, 1876.

Supreme court of the State of Louisiana.

MRS. MARY MURPHY
v.
FACTORS' INS. CO. ET ALS. } No. 6399.

Now comes into court Marshall J. Smith, trustee, and for answer to the appeal herein taken, says that he hereby joins in the appeal and prays that the same be affirmed so far as it effects his interest and for general relief.

(Signed) SINGLETON & BROWNE,
Attorneys for M. J. Smith.

Request to clerk to submit motions to dismiss on behalf of appellee.—Filed 20 *November*, 1876.

Supreme court.

MRS. MARY MURPHY, APPELLEE,
v.
THE FACTORS' & TRADERS' INS. CO., C. J. Leeds & Co., Percy Roberts, assignee, apellants. } No. 6399.

CLERK OF SUPREME COURT:

DEAR SIR: On behalf of appellee, Mrs. Mary Murphy, you are requested to submit the motions to dismiss fixed for to-day on briefs of appellee on file, and oblige.

209 November 20th, 1876.

Yours, respectfully,

(Signed) JAMES DAVID COLEMAN,
Attorney for Mrs. Mary Murphy, Appellee.

Cause submitted on motions to dismiss.—Extract from the minutes.

MONDAY, *November* 20, 1876.

The court was duly opened, pursuant to adjournment, present, their honors John T. Ludeling, chief justice, and Rufus K. Howell, William G. Wyly, Philip H. Morgan, J. Edwards Leonard, associate justices.

MRS. MARY MURPHY
v.
FACTORS' AND TRADERS' INSURANCE COMPANY et als. } No. 6399.

This case was called for trial of motions to dismiss the appeal and submitted to the court by counsel upon the briefs on file and to be filed within ten days.

Citation of appeal and return.—Filed 22 November, 1876.

5th district court.

MRS. MARY MURPHY
v.
FACTORS' & TRADERS' INS. CO. ET ALS. } No. 7255.

Petition and citation of appeal to be served on Mrs. Mary Murphy.

THE STATE OF LOUISIANA:

Fifth district court for the parish of Orleans.

To Mrs. Mary Murphy, greeting:

210 Whereas, Leeds & Co. have on the 14th day of July, 1876, filed in the office of the clerk of the fifth district court for the parish of Orleans, a petition of appeal from a certain final judgment rendered in the said court against them, which appeal is returnable in the supreme court, for the State aforesaid, on the 1st Monday of November, 1876.

You are therefore hereby cited to appear in person or by attorney in the said court, on the day last aforesaid, to answer the said appeal.

Witness the honorable E. North Cullom, judge of the court aforesaid, this 17th day of November, in the year of our Lord one thousand eight hundred and seventy-six.

[SEAL.] (Signed) PAUL T. ABADIE, *D'y Clerk.*

Received November 17, 1876, and on the 21st day of November, 1876, I served a copy of within citation and accompanying petition on Mrs. Mary Murphy, plaintiff herein, by leaving same at her domicile, No. 398 Constance street, in the hands of her son, Edward Murphy, a person apparently over 14 years of age, living and residing at said domicile, said Mrs. Mary Murphy being absent from home at time of said service. All of which facts I ascertained by interrogating said Edward Murphy. Returned same day. Sheriff's fee, $2. 211

(Signed) BEN. C. MIRE,
Deputy Sheriff.

Citation of appeal and return.—Filed 22 November, 1876.

MRS. MARY MURPHY
v.
FACTORS' & TRADERS' INS. CO. ET ALS. } No. 7255. 5th dist. court.

Petition and citations of appeal to be served on Mrs. Mary Murphy.

THE STATE OF LOUISIANA:

Fifth district court for the parish of Orleans.

To Mrs. Mary Murphy, greeting:

Whereas Percy Roberts, assignee of the firm of Lagan & Mackison, has, on the 18th day of July, 1876, filed in the office of the clerk of the fifth district court, for the parish of Orleans, a petition of appeal from a certain final judgment rendered in the said court against him, which appeal is returnable in the supreme court for the State aforesaid on the 1st Monday of November, 1876.

You are therefore hereby cited to appear in person or by attorney in the said court, on the day last aforesaid, to answer the said appeal.

Witness the honorable E. North Cullom, judge of the court aforesaid, this 17th day of November, in the year of our Lord one thousand eight hundred and seventy-six.

212 [SEAL.] (Signed) PAUL T. ABADIE,
Deputy Clerk.

Received November 17, 1876, and on the 21st day of November, 1876, I served a copy of within citation and accompanying petition of appeal on Mrs. Mary Murphy, plaintiff herein, by leaving same at her domicile, No. 398 Constance street, in the hands of her son, Edward Murphy, a person apparently over 14 years of age, living and residing at said domicile, said Mrs. Mary Murphy being absent from home at time of said service. All of which facts I ascertained by interrogating said Edward Murphy. Sheriff's fees, $2. Returned same day.

(Signed) BEN. C. MIRE,
Deputy Sheriff.

Citation of appeal and return.—Filed 22 *November*, 1876.

MRS. MARY MURPHY
v.
FACTORS' & TRADERS' INS. CO. ET ALS. } No. 7255. 5th dist. court.

Petition and citation of appeal to be served on Mrs. Mary Murphy.

THE STATE OF LOUISIANA:

Fifth district court for the parish of Orleans.

To Mrs. Mary Murphy, greeting:

Whereas the Factors' and Traders' Insurance Company has, on the 11th day of July, 1876, filed in the office of the clerk of the fifth
213 district court for the parish of Orleans a petition of appeal from a certain final judgment rendered in the said court against it, which appeal is returnable in the supreme court for the State aforesaid on the 1st Monday of November, 1876:

You are therefore hereby cited to appear, in person or by attorney, in the said court on the day last aforesaid, to answer the said appeal.

Witness: the Honorable E. North Cullom, judge of the court aforesaid, this 17th day of November, in the year of our Lord one thousand eight hundred and seventy-six.

[SEAL.] (Signed) PAUL T. ABADIE,
Deputy Clerk.

Received November 17, 1876, and on the 21st day of November, 1876, I served a copy of within citation and accompanying petition on Mrs. Mary Murphy, plaintiff herein, by leaving same at her domicile, No. 398 Constance street, in the hands of her son, Ed. Murphy, a person apparently over 14 years of age, living and residing at said domicile, said Mrs. Mary Murphy being absent from home at time of said service. All of which facts I ascertained by interrogating said E. Murphy. Sheriff's fees, $2. Returned same day.

(Signed) BEN. C. MIRE,
Deputy Sheriff.

214 *Opinion of the court on motions to dismiss.—Filed* 18 *December*, 1876.

Appeal from fifth district court, parish of Orleans.

MRS. MARY MURPHY
v.
FACTORS' & TRADERS' INSURANCE COMPANY
et al.
} No. 6399.

Mr. Justice WYLY:

From the final judgment in this case, signed on 3rd July, 1876, three appeals were taken, viz, one by the Factors' and Traders' Insurance Company, one by C. J. Leeds & Co., and one by Percy Roberts, assignee, all parties to this litigation.

Plaintiff, appellee herein, moves to dismiss the appeals:

1°. On the ground that citations of the appeals were served on her attorney, and not on herself, she being a resident of New Orleans.

2°. Reserving the benefit of this objection and without in any manner waiving it, she objects on the ground that Marshall J. Smith and other necessary parties, have not been made parties to the appeal.

3°. That the three appeals are improperly embraced in the same transcript.

There can be no valid objection to the appeals herein being contained in the same transcript; certainly the interest of plaintiff has not been impaired thereby. They are all for the settlement of this
215 litigation.

Marshall J. Smith, and E. E. Norton, assignee, have filed an appearance in this court which, of course, makes them parties, if they are necessary parties.

As to the objection that citations of the appeals were served on the attorney of plaintiff, and not on herself, we will remark that the record satisfies us; that it was the fault of the sheriff, and not of appellants who, in their petitions for appeals, prayed that plaintiff be cited.

In the case of the widow and heirs of Julien Seghers v. Nelvil Soulé and Albert Gaillard, decided in January, 1876, and not yet reported, this court said: "Appellants were not bound to mention the names of the appellees in their petition for appeal. They prayed that plaintiffs (who are appellees) be cited. This was sufficient. It was the duty of the clerk to issue citations to all the plaintiffs mentioned in the petition, and it was the duty of the sheriff to serve the citations. No appeal should be dismissed unless the fault is attributed to appellants." See act 45 of Extra Session of 1870, section 11; 17 L., 515; 2 A., 769; 12 A., 332; 13 A., 259; 14 A., 698; 16 A., 303; 21 A., 669.

216 As appellants have caused plaintiff to be served with citations since this motion was filed, it will not be necessary to continue the case for service of citations.

The motion to dismiss is denied.

Motions to dismiss overruled.—Extract from the minutes.

MONDAY, *December* 18, 1876.

The court was duly opened, pursuant to adjournment. Present, their honors John T. Ludeling, chief justice, and Rufus K. Howell, William G. Wyly, Philip H. Morgan, J. Edwards Leonard, associate justices.

His honor Justice Wyly pronounced the judgment and decree of the court in the following case:

MRS. MARY MURPHY
v.
FACTORS' & TRADERS' INS. CO. ET ALS.
No. 6399.

On appeal from the fifth district court, for the parish of Orleans.

The motion to dismiss is denied.

Answer of Widow M. Murphy, appellee.—Filed 15*th March,* 1877.

WIDOW MARY MURPHY
v.
THE FACTORS' & TRADERS' INS. CO.
No. 6399. In the supreme court.

Now into this honorable court, by her undersigned counsel, comes Widow Mary Murphy, appellee, and for answer to the appeals 217 herein taken by the Factors' and Traders' Insurance Company, Leeds & Co., and Lagan & Mackison, through Percy Roberts, assignee, says that the judgment of the court a qua is correct and should be affirmed by this honorable court.

That the appeals herein taken are frivolous, and were taken merely for delay, and that appellants should be condemned to pay the highest damages allowed by law.

Wherefore she prays that the judgment of the lower court be affirmed, and that each of said appellants be condemned to pay to respondent such damages as this honorable court may deem fit and proper to allow, and respondent prays for general relief, &c.

(Signed) JAMES DAVID COLEMAN,
Attorney for Appellee.

Order striking cause from promissory-note docket.—Extract from the minutes.

TUESDAY, *March* 20, 1877.

The court was duly opened. Present, their honors Thomas C. Manning, chief justice, and Robert H. Marr, Alcibiade De Blanc, William B. Egan, William B. Spencer, associate justices.

MRS. MARY MURPHY
v.
FACTORS' AND TRADERS' INSURANCE COMPANY
et als.
No. 6399.

218 This case was called for trial, and counsel for defendant having suggested to the court that the same had been improperly placed on the docket instituted by the rule of this court of the 23d day of March, A. D. 1874—

The court ordered the case to be stricken from that docket and reinstated on the ordinary docket in the order in which it stood previous to such improper transfer.

REC. 966—7

Supplemental and amended answer.—Filed 7th January, 1880.

WIDOW MARY MURPHY
v. } No. 6399. In the supreme court.
THE FACTORS' & TRADERS' INS. CO.

To the honorable the supreme court for the State of Louisiana:

Now, into this honorable court, by her undersigned attorney, comes Widow Mary Murphy, appellee, and for supplemental and amended answer says that the facts of this cause and the law applicable thereto justify an amendment and modification of the judgment of the lower court rendered in her favor, to the following effect:

1°. That said judgment fixes no term for a compliance by the defendant and appellant, the Factors' and Traders' Insurance Company,
219 with the alternative conditions thereof, and said compliance should be limited by this honorable court to ten days from the judgment herein, should same in other respects be affirmed.

2°. That said judgment allows fees only on the amount of the principal sued for, that appellee is entitled in law (the facts warranting), to 5 % for attorney's fees on the amount of principal and interest, and that this honorable court should so decree.

3°. That the Factors' and Traders' Insurance Company, appellant and defendant, should, under the law applicable to the facts developed in this cause, be condemned personally to pay to plaintiff and appellee any balance remaining due and unpaid on her said judgment should the hypothecated property not sell for sufficient to pay the same in full, and in such event that p la'tiff and appellee is entitled to judgment and execution against said Factors' and Traders' Insurance Company for any such unpaid balance, and that this honorable court should so decree.

Wherefore Widow Mary Murphy, appellee, reaffirming her prayer for damages as against all appellants other than said Factors' and Traders' Insurance Company, prays that the judgment of the lower court
220 in her favor, be amended and modified as above set forth by this honorable court, and she prays for general relief, and as in duty bound, &c.

(Signed) JAMES DAVID COLEMAN,
Attorney for Widow Mary Murphy, Appellee.

Cause continued.—Extract from the minutes.

SATURDAY, *January* 10, 1880.

The court was duly opened. Present, their honors, Thoman C. Manning, chief justice, & Robert H. Marr, Alcibiade De Blanc, William B. Spencer, Edward D. White, associate justices.

MRS. MARY MURPHY
v. } No. 6399.
FACTORS' AND TRADERS' INSURANCE COMPANY.

This case was called for trial, and having heard argument from James David Coleman, esq., of counsel for plaintiff and appellee, and from Bentinck Egan, esq., of counsel for defendants and appellants, the court ordered said case to be continued for further argument till Monday the 19th instant.

Cause submitted.—Extract from the minutes.

MONDAY, *January* 19, 1880.

221 The court was duly opened pursuant to adjournment. Present, their honors Thomas C. Manning, chief justice, and Robert H. Marr, Alcibiade De Blanc, William B. Spencer, Edward D. White, associate justices.

MRS. MARY MURPHY
v.
FACTORS' & TRADERS' INS. CO. } No. 6399.

This case was called for resumption of trial, and having heard argument from James David Coleman, esq., of counsel for plaintiff and appellee, and from Gilbert L. Hall, esq., of counsel for the defendants, appellants herein, the court took said case under advisement upon the briefs on file and to be filed within seven days.

Order reinstating cases.—Extract from the minutes.

MONDAY, *April* 5, 1880.

Be it remembered that on this fifth day of April, in the year of our Lord one thousand eight hundred and eighty, at 11 o'clock a. m., the crier of the court having announced the chief justice and the associate justices of the supreme court of the State of Louisiana, their honors proceeded to take the bench, standing in the rear of the vacant seats.

The chief justice then announced: "The supreme court of the State of Louisiana, under the constitution of 1879, will now be organized. The justices appointed, confirmed, and commissioned are all present 222 and about to enter upon the discharge of their functions. The court appoints Mr. George W. Dupré clerk pro tempore. The commission of the chief justice will now be read."

After reading of the same, the commission of the senior justice, Felix P. Poché, was ordered to be and was read. Whereupon the oath of office was administered to him by the chief justice.

The commission of the honorable Robert B. Todd was ordered to be and was read. Whereupon the oath of office was administered to him by the chief justice.

The commission of the honorable William M. Levy, associate justice, was ordered to be and was read. Whereupon the oath of office was administered to him by the chief justice.

The commission of the honorable Charles E. Fenner, associate justice, was ordered to be and was read. Whereupon the oath of office was administered to him by the chief justice.

The commissions and oaths of office were ordered to be spread on the minutes.

223 Their honors Edward Bermudez, chief justice and Felix P. Poché, Robert B. Todd, William M. Levy, Charles E. Fenner, associate justices, being qualified, took their seats.

The chief justice then announced Mr. George W. Dupré as the clerk of the court. Whereupon the oath of office was administered to Mr. George W. Dupré by the chief justice, and his official bond, with Adolph Meyer and James D. Houston as sureties thereon, each for five thousand ($5,000) dollars, having been accepted, the court was pronounced duly organized, and the sheriff was ordered to and did open court.

It is ordered by the court that all cases heard and not determined by the late supreme court be called for trial and argument in their regular order on the docket.

Cause submitted.—Extract from the minutes.

FRIDAY, *April* 23, 1880.

The court was duly opened. Present, their honors Edward Bermudez, chief justice, and Felix P. Poché, Robert B. Todd, William M. Levy, Charles E. Fenner, associate justices.

MRS. MARY MURPHY
v.
FACTORS' AND TRADERS' INSURANCE COMPANY. } No. 6399.

224 On the motion of counsel for parties in interest this case is taken under advisement by the court upon the briefs and papers on file.

In the event that no decision is rendered by the court previous to adjournment for the term, the case will be called and regularly fixed for trial.

Document X.—Filed 24 *April*, 1880.

IN RE MARY MURPHY
v.
FACTORS' & TRADERS' INS. CO. ET ALS. } No. 6399.

United States circuit court-room, April 24, 1880.

Hon. ED. BERMUDEZ, *Chief Justice:*

DEAR SIR: In the above-entitled cause we have been informed that the cause was not reached yesterday, but that there was a proposition made by counsel for plaintiff, and acceded to by the counsel of the insurance company, to submit. We are equally interested in the cause, as attorneys for Leeds & Co., and we desire to argue the case orally. We, therefore, hope that if any such order has been made, that it may be recalled.

Very faithfully, your obedient servants,
(Signed). SINGLETON & BROWNE,
Attorneys for Leeds & Co.

225 *Order revoking submission of cause.—Extract from the minutes.*

SATURDAY, *April* 24, 1880.

The court was duly opened. Present, their honors Edward Bermudez, chief justice, and Felix P. Poché, Robert B. Todd, William M. Levy, Charles E. Fenner, associate justices.

MRS. MARY MURPHY
v.
FACTORS' & TRADERS' INS. CO. ET ALS. } No. 6399.

The order of submission on briefs entered yesterday was made on the representation that all parties concerned agreed to it. It appearing that Messrs. Singleton & Browne, of counsel for Leeds & Co., have not consented but oppose the submission, and insist on their right to an oral argument—

It is ordered by the court that the entry of submission be recalled.

Cause continued.—Extract from the minutes.

FRIDAY, *November* 5, 1880.

The court was duly opened. Present, their honors, Edward Bermudez, chief justice, and Felix P. Poché, Robert B. Todd, William M. Levy, Charles E. Fenner, associate justices.

MRS. MARY MURPHY
v.
FACTORS' & TRADERS' INS. CO. ET ALS. } No. 6399.

226 This case was called for trial, whereupon the court ordered the same to be continued, for the purpose of argument, to Friday the 19th instant.

Cause submitted.—Extract from the minutes.

FRIDAY, *November* 19, 1880.

The court was duly opened. Present, their honors Edward Bermudez, chief justice, and Felix P. Poché, Robert B. Todd, William M. Levy, Charles E. Fenner, associate justices.

MRS. MARY MURPHY
v.
FACTORS' AND TRADERS' INSURANCE CO. ET ALS. } No. 6399.

This case was called for resumption of trial, and having heard argument from James David Coleman, esq., of counsel for plaintiff and appellee; from Bentinck Egan, esq., of counsel for Per. Roberts, assignee of Lagan & Mackison, defendant and appellant; from Gilbert L. Hall, esq., of counsel for the Factors' and Traders' Insurance Company, defendant and appellant; and from Charles B. Singleton, esq., of counsel for Leeds & Co., warrantors and appellants herein—

The court took said case under advisement upon the briefs for parties in interest and the papers now on file.

227 *Opinion of the court.—Filed* 31 *January*, 1881.

MRS. MARY MURPHY, APPELLEE,
v.
FACTORS' AND TRADERS' INSURANCE COMpany et als., appellants. } No. 6399.

Appeal from the fifth district court, parish of Orleans.

Mr. Justice LEVY:

The plaintiff, Mrs. Mary Murphy, alleges, in her petition, that she is the legal holder and owner, before maturity, of two promissory notes, each for $10,000, signed by Paul Cook and Justis Vairin, jr., in solido, dated March 18th, 1870, payable one year after date to the order of said makers and by them endorsed, which notes bear 8% per annum interest from maturity. Two other notes of same date and maturity, each for the amount of $10,000, held by the Factors' and Traders' Insurance Company, together with those above described, were secured by a special mortgage of like date with said notes, executed by said Cook and Vairin, on certain lots and buildings thereon, together with the machinery, fixtures, &c., situated in the city of New Orleans, and known as the Orleans Refinery. That on the 21 of February, 1871, Cook and Vairin, individually and as members of the firm of Paul 228 Cook & Co., were adjudged bankrupts by order of the United States district court of Louisiana; and in these proceedings in bankrutcy, Marshall J. Smith was chosen trustee by the creditors who participated in said proceedings and confirmed as such by said United States district court. That said bankrupts surrendered, in bankruptcy, as part of their estate, the said property mortgaged as aforesaid to secure the payment of said notes; that, on motion of said trustee the said United States district court ordered the sale of said mortgaged property to be made at public auction, which was accordingly done on the 21st of December, 1872, and said property was, by the auctioneer, adjudicated to C. J. Leeds & Co., Lagan & Mackison, John Hennesey, T. A. Archer, as liquidator of the firm of Marshall J. Smith & Co., and the Factors' and Traders' Insurance Company, and on the 20th of June, 1873, by notarial act said property was sold and conveyed to the Factors' and Traders' Insurance Company, said company thereby becoming sole owner thereof. She alleges that this sale was made subject to her mortgage as aforesaid and the said company became liable to her in the full amount of said notes held by her, with special mortgage on 229 said property, and that she is entitled to have said property seized and sold to pay her said mortgage, interest, and costs, together with 5% on the amount sued for as attorney's fees, as stipulated in the act of mortgage. She avers that said mortgage act contained the pact de non alienando and that by virtue of the proceedings and purchase by said insurance company the mortgage, to the extent of the interest held therein by the Factors' and Traders' Insurance Company to secure the payment of the two notes held by it, became extinguished by confusion, and that that said mortgage has and is of full force and effect only to the extent of plaintiff's interest therein, to secure the payment of the notes aforesaid held by her, with interest, costs, attorney's fees, &c. She further alleges that she was in no manner a party to the proceedings in bankruptcy, and that she had no knowledge of and took no part in any of the proceedings above recited and cannot be affected or concluded thereby. She finally prayed that the Factors' and Traders' Insurance Company, E. E. Norton, assignee in bankruptcy of Paul Cook & Co., and of Cook and Vairin, and Marshall J. Smith, trustee of the creditors of the bank- 230 rupts, be cited to defend this suit, and that there be judgment in her favor and against the said defendants, in solido, for the aforesaid sum of twenty thousand dollars, with interest, attorney's fees, and costs, as claimed, and decreeing that said mortgage on said property to the extent of the interest which the said insurance company may have had by virtue of its ownership of the two notes before mentioned, be declared to have been extinguished by confusion, and recognizing and enforcing plaintiff's mortgage on said property, and that the same be sold to pay the debt due plaintiff.

E. E. Norton filed an exception of no cause of action as against him, which was sustained.

The Factors' and Traders' Insurance Company in their answer admit that the proceedings in bankruptcy were had as alleged in the petition, and that they were the holders and owners of the two notes of $10,000 each, and secured by mortgage on said property as set forth, which were concurrent with those held by plaintiff. They aver that, pursuant to an agreement of the creditors and the order of the United States district court, the said mortgaged property was, on the 21st of December, 1872, offered for sale, and adjudicated to Leeds & Co., 231 Lagan & Mackison, John Hennesey, T. A. Archer and respondents, for $45,000, and that solely for the mutual accommodation of said parties, subsequently, on the 23d June, 1873, without any valuable consideration whatever, the title thereto was taken in the Factors' and Traders' Insurance Company, and it was agreed by the adjudicatees, that said company should, for their joint account, discharge all costs, expenses, charges, taxes, and other claims, on said property. That the parties to whom the property was adjudicated, were all either privilege or mortgage creditors, and in consideration of this they bid in the property, in default of a bid equal to the aggregate amount of their claims, and that the sole reason therefor, aside from mutual convenience, was the belief that each party to the agreement was either a privilege or mortgage creditor or represented such, that all the privileges and mortgages upon the property were represented, and that without this belief there was no motive for said agreement, and none such would ever have been entered into. They specially aver, that it was the belief of all parties to said agreements, adjudication, and sale, that T. A. Archer held and represented the two notes of Mrs. Murphy now sued on, and that it was on her behalf alone that he became 232 a party to said transactions. They aver, that they had reason to believe and did believe, that said Archer, did in reality act as the agent of Mrs. Murphy; that he made known to her the steps which were being taken in her behalf; that he frequently advised with her; that she had full knowledge of all that was being done and freely assented thereto, and that she was as fully bound as if she had been personally present acting for herself, and if this had not been the belief of defendants, on such agreement would ever have been entered into. That said Archer is erroneously made to appear as liquidator representing firm of M. J. Smith & Co., which said firm never had been and was not at the time of sale either a privilege or mortgage creditor of Cook & Co., and therefore had no direct interest in said transaction. That the notes of plaintiff had been for a long time, and were at the date of the transaction, in possession of Marshall J. Smith & Co., the only qualified attorney in fact of Mrs. Murphy. That they dealt with Archer under the conviction that he was the duly-authorized agent of plaintiff, and as she had full knowledge of his acts in the premises and made no objection thereto, she should be bound thereby, and be decreed to be the owner of her proportionate share of the said property. 233 They further represent, that if the court shall determine that said Archer was not the duly-authorized agent of Mrs. Murphy, and she is not bound by his acts, then there was great and serious error of fact to their prejudice, as to the character or quality in which he was acting; that defendants acted from a mistaken belief as to his real capacity, and are entitled by reason of said error to a re'cission of said adjudication and sale, or that otherwise they will be made the innocent sufferers of irreparable injury and loss. That acting in the belief that all the privilege and mortgage creditors, including the plaintiff, had been duly represented in said transactions, and were bound and con-

cluded, and pursuant to the above-mentioned agreement, they, for the benefit and advantage of all parties, did defray all the costs incident to said proceedings, and have since paid out large sums of money on said property for its care and preservation, and for taxes due to the State and city, amounting in the aggregate to $11,454.83 and that they are entitled to a privilege and preference upon said property over all other creditors for said amount, with interest from 17th December, 1873, when said payments were made. They further aver that they are now
the true and legal owners of all of said property but that whilst
234 the title is in their name, the real owners are themselves, and their
coadjudicatees, and they should be called in to defend their interests. They deny that they are personally bound to plaintiff; but that any claim which she may establish will attach solely to the property in question, or its proceeds, and she can only look to these for its settlement. They call in warranty their coadjudicatees. They pray that there be judgment recognizing the said T. A. Archer as the agent of plaintiff in said sale, and, that she be bound thereby; that she be recognized as one of the co-owners of said property in her just proportion, subject to her proportion of the amounts paid by respondents for costs, taxes, &c., or that she have judgment only for her proportionate share of the net proceeds of the sale of said property; or if the court shall determine that said Archer was not the agent of said plaintiff; that by reason of said error of fact the sale shall be rescinded, and the property be held as it now stands, merely for the purpose of selling it, to the end that the proceeds arising therefrom may be distributed as follows: 1st. That defendants be reimbursed the sum of $11,454.83 expended by them for the benefit of all parties concerned. 2d. That the balance
therefrom be distributed between the privileged and mortgage
235 creditors according to their rank, in the same manner as though
the property had been regularly sold by virtue of proper legal proceedings by said parties against Paul Cook & Co., the original debtors, and that all the privileges and mortgages be recognized as in full power and effect. The coadjudicatees, Lagan & Mackison, through Percy Roberts, assignee, John Hennesey, Leeds & Co., and T. A. Archer, called in warranty, also filed their answers, Archer averring that he was, either expressly or impliedly, authorized to represent and act for Mrs. Murphy in the transactions set forth in the petition and proceedings, and the others setting up their privileges and adopting the allegations of the answer of the Factors' and Traders' Insurance Company. Marshall J. Smith, trustee, also answered, denying any liability on his part, and denying that was cause of action against him.

There was judgment in favor of plaintiff, decreeing the extinction by confusion of the mortgage securing the notes held by the Factors' and Traders' Insurance Company, recognizing the mortgage as securing plaintiff's debt, decreeing that plaintiff recover of Factors' and Traders' Insurance Company the amount of the notes, with interest
claimed, attorney's fees at 5% on the principal claimed, and
236 costs of suit; or, in default of such payment, that they deliver
up all the mortgaged property to be sold to satisfy the judgment, rejecting the claims and demands set up by the company, and the parties called in warranty by them, and dismissing the suit as against M. J. Smith, trustee, and E. E. Norton. From this judgment all the parties defendant have appealed, except Smith atd Norton.

This full statement of the pleadings is necessary in order to comprehend fully the grounds of plaintiff's action and defendants' grounds of defence.

The questions for solution and decision are as follows:

1st. Was Mrs. Murphy represented in the matters of the bankrupt proceedings, the adjudication at the trustee's sale, and the subsequent sale to Factors' and Traders' Insurance Company, and bound thereby?

2nd. Was the mortgage claim of the Factors' and Traders' Insurance Company, arising out of the two mortgage notes of Paul Cook & Co., held by them, extinguished by confusion taking place on their *the* purchase of the mortgaged property?

3rd. If Mrs. Murphy's mortgage exists, is she entitled to personal judgment against the Factors' and Traders' Insurance Company for the amount of the notes held and owned by her, with interest,
237 costs, and attorney's fees, with the right to seize and sell the
mortgaged property, and is said company bound to her, and can she execute her judgment against them for any balance due her on her notes, if the proceeds of sale of the property should not be sufficient to satisfy her judgment?

4th. Should the 5% for attorney's fees be allowed upon the principal and interest due on her two notes?

We will decide this case exclusively on the record as it stood before the district court, when the judgment appealed from was rendered, without prejudice to the rights, if any, which may have since accrued to the parties litigant.

1st. The evidence contained in the record fails to satisfy us that Mrs. Murphy was represented in the bankrupt proceedings as to Paul Cook & Co., the adjudication at the trustee's sale, the subsequent sale to the Factors' and Traders' Insurance Company, or that she had notice of any of these matters. Without the fulfilment of these requirements, or her subsequent ratification, she cannot be legally bound, and her mortgage rights have not been destroyed or impaired.

Mrs. Murphy was certainly not personally notified of any of
238 the proceedings in bankruptcy. No written or special authority
to Marshal J. Smith to represent her in these proceedings as a creditor of the bankrupts is to be found in the record, nor is there satisfactory proof to establish that such authority was granted by her to any one. On the contrary, her averments that she had no notice are not disproved, and the fact of notice to her should be affirmatively established by those claiming or asserting this fact.

The order of the United States district court for the sale of the property free of all incumbrances could not divest her mortgage rights or privileges without the notice contemplated and required by the bankrupt laws.

In Willard v. Brigham, 25 A., 600, this court held: "If the mortgagee is not made a party to the proceedings to sell the property free from all incumbrances, his rights will be unaffected by the sale."

"The application for a sale of property free from incumbrances must state what persons have liens, incumbrances, or interest therein, and notice must be given to all persons having liens or incumbrances on the property." Bump on Bankruptcy, 155.

In the case above cited from 25 A., 600, it was held as follows:
239 "The important questions are: First. Whether the United States
court sitting in bankruptcy had authority under the bankrupt law of 1867 to order the sale of the property free of all incumbrances? Second. If the court had the authority, have the requirements of the law been observed so as to remove the special mortgage set up in this

case? On the first point we find no difficulty. The Supreme Court of the United States have frequently held that the property of the bankrupt may be sold free of incumbrances, by order of the bankrupt courts, and the same has been decided by this court. In order, however, to sell property free of incumbrances the assignee must apply to the bankrupt court for an order to that effect, and must set forth the facts that justify the order, that the judge may decide whether the application should be granted. As this proceeding especially affects the rights of the secured creditor, he must be properly notified and summoned to appear and protect his interests. This is done by passing an order to shew cause, and directing that a copy of such order and the petition be served upon him. Bump on Bankruptcy, 6 ed., p. 151, and authorities there cited.

"In the case before us we do not find that Norsworthy was properly
notified, or was legally made a party to the proceeding re-
240 sulting in the order to sell the property in question free of his
prior mortgage. Not being a party to the proceedings, his rights are unaffected thereby. The property has passed out of the hands of the bankrupt court; it was therefore useless to cite the assignee." This case having been taken to the Supreme Court of the United States on a writ of error, that tribunal affirmed the judgment of this court, and in the opinion rendered by Justice Clifford, as the organ of the court, he said: "Such sales may be made without notice to the secured creditor; but if the assignee desires to sell the property free of all incumbrances he must obtain authority from the bankrupt court, and must see to it that all the creditors having liens on the property are duly notified, and that they have opportunity to adopt proper measures to protect their interests." 23 Wallace, 128; King v. Bowman, 24 A., 506; 10 Blatchford, 515; 20 Wall., 201; 24 Howard, 205.

The record, as we have stated, disclosing no legal notification or summons to Mrs. Murphy, a secured creditor, the decisions above cited fit most aptly this case, and are controlling in their effect.

We are therefore led to the conclusion that Mrs. Murphy being
241 no party to the proceedings whereby the order of sale was ob-
tained, her rights were unaffected thereby. We next consider the effect of the adjudication and then the subsequent sale to the Factors' and Traders' Insurance Company. At the trustee's sale of the mortgaged property it was adjudicated to the following persons (for the sum of $45,000, on the terms of one-third cash and the balance payable in one and two years, with 8% interest on the credit terms): The Factors' and Traders' Insurance Company, Messrs. Leeds & Co., Lagan & Mackinson, John Hennessey, T. A. Archer, liquidator of Marshall J. Smith & Co., and about six months after the adjudication, by a notarial act and agreement, the above mentioned adjudicatees relinquished all their rights, title, and interest in the property to their coadjudicatee, the Factors' and Traders' Insurance Company, and the terms of the original sale were changed and lieu thereof the terms were made cash. It will be perceived that in none of the proceedings and acts does the name or interest of Mrs. Murphy appear, nor is there the slightest reference to any of the parties as representing her as her agent or attorney in fact, and there is not to be found in the full and complete rec-
ord any written document or authority from her to any person, con-
242 senting to any sale, agreeing that any sale should be made of
the property free of incumbrances, authorizing the purchase of the property for her or ratifying the adjudication, acknowledging or recognizing the adjudication to T. A. Archer as being for her or her

benefit, consenting to the change of terms of sale or ratifying or assenting to the subsequent sale to the Factors' and Traders' Insurance Company, or in any manner connecting her with the acts of T. A. Archer, the liquidator of M. J. Smith & Co. It is only necessary to assert the elementary principle that contracts for the acquisition or alienation of real estate must be in writing and authority to an agent to acquire or dispose of such property must be originally in writing or subsequently ratified in writing. There is not only no such instrument in writing, but in none of the proceedings or even authentic acts is it alleged or stated, or are any expressions whatever used, which tend to disclose the creation or existence of any agent representing Mrs. Murphy in the bankrupt proceedings, the adjudication, or the transfer to the insurance company. Whatever may have been the individual belief of any of these parties in regard to the participation of Mrs. Murphy in these
transactions, or her assent or ratification thereof through the
243 agency of Smith or Archer, there seems to have been a marked
and apparently studious abstinence from the use of any expression identifying her with the acts of these persons, and nothing in all the solemn acts which in the remotest decree connect her therewith. After the most patient and careful investigation of the record, the most patient consideration of the arguments contained in the able and elaborate briefs filed, we are unable to discover anything which binds Mrs. Murphy as a co-owner of the property conveyed to the Factors' and Traders' Insurance Company, or which can limit her rights under her mortgage to a pro rata participation in the proceeds of the sale of the property. The mistaken belief and error of fact which the insurance company alleges it has fallen into cannot be visited upon the plaintiff; and while not legal it would surely be unjust to sacrifice her rights and make her a vicarious expiator of the mistakes of the company. Mere considerations of equity may be invoked where the law is silent or its construction obscure or doubtful, but where the plain letter and spirit and reason of the law stand forth in bold relief, courts cannot close their ears to its imperative mandates or blind their eyes to
its plain teachings. We think the grounds for setting aside the
244 adjudication and sale by reason of the alleged error of fact are
not sufficient in this case to justify such action on our part. (C. C., arts. 1826, 1847, 1823, 1836; 22 A., 14.)

Having disposed of the first question and its several branches the others require no lengthy discussion.

When the adjudication was made to the insurance company and its coadjudicatees, it carried the property free of the incumbrances in favor of all the parties who had assented to the sale or had been properly or duly notified of the proceedings which provoked it, and burdened with the incumbrance in favor of the plaintiff. Extinguishment, by confusion, of the mortgage and privileges in favor of the adjudicatees took place at once, and the Factors' and Traders' Insurance Company, to whom the sale was subsequently made by agreement among the adjudicatees, holds the property subject to and affected by the mortgage rights of the plaintiff, Mrs. Murphy. (2 R., 201; 2 A., 114; 28 A., 845.)

We do not think that the plaintiff is entitled to a personal judgment against the insurance company, but her rights are limited, as hereinafter prescribed, to the mortgaged property, on which she may enforce
her judgment in satisfaction of her mortgage notes. We have be-
245 fore stated that the property was sold subject to the mortgage
in favor of the plaintiff; to that she must be confined. (4 L., 451.)

The record discloses that, after the adjudication and the sale to the

Factors' and Traders' Insurance Company, the company sold the machinery, fixtures, &c., which had been specially mortgaged. When the company acquired this property it came to them burdened with the mortgage in favor of the plaintiff, and they held it and all of it, as third possessor, subject to that mortgage. It is clear to us, therefore, that this company is, under article 3407 of our Civil Code, to the extent hereafter stated, liable to the plaintiff on account of the mortgaged property disposed of by it. "The deteriorations, which proceed from the deed or neglect of the third possessor to the prejudice of the creditors who have a privilege or mortgage, give rise against the former to an action of indemnification." (Code Napoleon, 2175.)

"A third possessor may make any change he pleases in buildings on the property, but if he diminish its value thereby he will be responsible to the mortgagee." (5 N. S., 187; 6 N. S., 114; 2 A., 365; 19 L., 478.)

The machinery and fixtures were part of the mortgaged property, 246 immovable by destination, and the mortgage with the pact de non alienando contained therein vested upon all the property, and the third possessor held it with full knowledge of and subject to the incumbrances which burdened it, and if the property remaining has been deteriorated by his deed he is liable in an action of indemnification, and in this case the right to proceed by such action must be reserved to the mortgage creditor.

We are of opinion that the company is not entitled to have the amount claimed for taxes, expenses, &c., paid by it, constitute a charge upon the property with priority over or even concurrence with plaintiff's claim. "A purchaser of property subject to a mortgage containing the clause de non alienando and duly registered cannot claim to be in any better condition than his vendor nor plead any exception the latter could not." (2 N. S., 32; 19 L., 39; 13 L., 315; 2 R., 378; 6 R., 58; 30 Am., 800; Bump on Bankruptcy, 320.)

It is not necessary to enter into a discussion as to the validity of the alleged privileged claims of Leeds & Co. and others. It suffices to state that if they had privileges they have been extinguished by their own acts and by their acquisition, together with their coadjudicatee, of the property on which they might have operated. As owners they cannot at the same time be mortgagees or privileged creditors as to their 247 own property. The appellee, in her supplemental answer to this appeal, asks for an amendment of the judgment of the lower court, which only allows 5% attorneys' fees on the principal of the mortgage notes. She is entitled to 5% attorneys' fees on the amount of the debt, principal and interest, until payment; the interest is a part of the debt, and this percentage should be allowed and recognized as being secured by the mortgage.

We perceive no error in the rulings of the court a qua on these points to which the defendants have taken their bills of exception, to wit, that agency to sell immovable property cannot be proved by parol evidence, nor should such evidence be admitted to contradict the written act of sale in this case.

It is therefore ordered, adjudged, and decreed that the judgment of the fifth district court for the parish of Orleans in this case be amended by allowing five per cent. as attorneys' fees on the amount of the two notes held by plaintiff, principal and legal interest thereon, from the maturity thereof until paid; and that said judgment be further amended by limiting the same to the enforcement of the mortgage by seizure and sale of the mortgaged property to satisfy said judgment, and that the right be reserved to plaintiff in the event that the mortgaged property

shall not sell for an amount sufficient to satisfy said judgment
248 to proceed in an action of indemnification against the defendant,
the Factors' and Traders' Insurance Company, for the recovery of the balance which may be due on said judgment to the extent of the value of the mortgaged property removed and disposed of by the said defendant, and that the judgment of said lower court is in all other respects affirmed at appellees' costs.

Judgment and decree.—Extract from the minutes.

MONDAY, *January* 31, 1881.

The court was duly opened pursuant to adjournment. Present their honors Edward Bermudez, chief justice, and Felix P. Poché, Robert B. Todd, William M. Levy, Charles E. Fenner, associate justices.

His honor Justice Levy pronounced the judgment and decree of the court in the following case:

MRS. MARY MURPHY
vs.
FACTORS' & TRADERS' INSURANCE COMPANY et als.
No. 6399.

On appeal from the fifth district court, for the parish of Orleans.

It is ordered, adjudged, and decreed that the judgment of the fifth district court, for the parish of Orleans, in this case, be amended by allowing five per cent. as attorney's fees on the amount of the two notes held by plaintiff, principal and legal interest thereon from the
249 maturity thereof until paid; and that said judgment be further
amended by limiting the same to the enforcement of the mortgage by seizure and sale of the mortgaged property to satisfy said judgment, and that the right be reserved to plaintiff, in the event that the mortgaged property shall not sell for an amount sufficient to satisfy said judgment, to proceed in an action of indemnification against the defendant the Factors' and Traders' Insurance Company for the recovery of the balance which may be due on said judgment, to the extent of the value of the mortgaged property removed and disposed of by the said defendant, and that the judgment of said lower court is in all other respects affirmed at appellees' costs.

Petition for rehearing.—Filed 7th February, 1881.

MRS. MARY MURPHY, APPELLEE,
v.
THE FACTORS' AND TRADERS' INSURANCE COMPANY, appellant.
No. 6399.

Supreme court of Louisiana.

To the honorable the chief justice and the associate justices of the supreme court of Louisiana:

The petition of Edward A. Palfrey, president of the Factors'
350 and Traders' Insurance Company, and on behalf of that company,
a corporation duly incorporated under the laws of Louisiana, and domiciled in the city of New Orleans, with respect represents that a final judgment was rendered herein on the 31st of January, 1881, and that he desires and prays your honors to grant a rehearing in said cause to him on the following grounds:

1st. That Mrs. Mary Murphy was represented in the matter of the bankrupt proceedings of Paul Cook & Co., and in the adjudication at the trustee's sale, and the subsequent sale to the Factors' and Traders' Insurance Company, and was bound thereby; that Marshal J. Smith had been her agent for years, and invested her money in the purchase of the note sued on, and held them when all the bankrupt proceedings took place in which the makers, Paul Cook & Co., were parties, which notes were good in the hands of any holder, and secured by such title as appeared by the actual and only records.

2. That Mrs. Murphy was cognizant of every step that was taken concerning her secured claim against the bankrupts Paul Cook & Co., and ratified and confirmed, expressly and impliedly, what Marshal J. Smith & Co. in liquidation did for her and in her behalf on account of said notes, mortgages, and claim.

3. That if Mrs. Mary Murphy, or the holder of those notes, did not agree to what was done in the bankrupt proceedings of Paul Cook & Co. concerning the interests secured by the mortgage given by Paul Cook & Co., or ratify the same, then there was a serious error of fact involving the real motive to the adjudication sale and agreement
251 of all the other mortgage and secured creditors, in what they did to secure themselves, that amounts to a fraud practiced upon them, that should in law and equity relieve the insurance company from the effect of such sale and adjudication made in error, and place all secured creditors, so far as secured rights are concerned, where they were before the sale or adjudication occurred, and that parties alleging such error of fact should have been permitted to introduce evidence to establish and prove such constructive fraud and error of fact.

4. Petitioner prays for oral argument on this application for a rehearing.

(Signed) GIBSON, HALL & MONTGOMERY,
Attorneys for Factors' & Traders' Ins. Co., Appellant.

Motion for delay to file briefs.—Filed 14th Feb'ry, 1881.

Supreme court of La.

MRS. MARY MURPHY
v.
FACTORS' & TRADERS' INS. CO. ET AL. } No. 6399.

On motion of Gibson, Hall & Montgomery, of counsel for the Factors' & Traders' Insurance Company, appellant, it is ordered that three days time be granted in which briefs may be filed on the application for a rehearing.

Order allowing delay.—Extract from the minutes.

MONDAY, *February* 14, 1881.

The court was duly opened, pursuant to adjournment.

Present, their honors Edward Bermudez, chief justice, & Felix P. Poché, Robert B. Todd, William M. Levy, Charles E. Fenner, associate justices.

MRS. MARY MURPHY
v.
FACTORS' & TRADERS' INS. CO. & ALS. } No. 6399.

On motion of Gibson, Hall & Montgomery, of counsel for the Factors' & Traders' Ins. Co., appellant, it is ordered by the court that a delay of three days be granted in which briefs may be filed on the application for rehearing in this case.

252 *Brief of Factors' & Traders' Ins'ce. Co. for rehearing.—Filed February 17th, 1881.*

Supreme court of Louisiana.

MRS. MARY MURPHY, APPELLEE,
vs.
THE FACTORS' AND TRADERS' INSURANCE Company et als., appellants.
No. 6399.

It is a delicate matter to apply for a rehearing in a cause where the litigant, while smarting under defeat, is warmed with the conviction that the court had been led into an error in regard to the facts to which the law is to be applied.

In an important case, where a large amount of money is also involved, that facts adds anxiety for the final result.

It is especially so when the litigant is in possession of facts that he has not been permitted to prove, by evidence good and conclusive to his mind, through erroneous rulings of the lower court.

Justice is the foundation on which law and equity rest the structure that courts frame into a decree.

In the case at bar every theory of solution is met by the fact that all of the equities are with the defendants.

Justice guided by law will surely bring them relief from the exactions of plaintiff's demand.

253 It is a speculation in law, based upon legal technicalities. It seems more than improbable to suppose that Mrs. Murphy acted as she says she did, when she is not supported by a single witness, and is directly contradicted by several well-known men of this city.

What person would "look to the notes," as she says she did, for her money, when those notes have only the names of bankrupts on them, who have no property or effects, save mortgaged real estate which alone secures them.

Surely the property will be kept well in view under such circumstances by the man or woman holding the notes.

We ask for oral argument in this application for a rehearing, which was not as extended as counsel desired upon the trial in the first instance. This the court will remember, and the importance of the case causes us to claim the privilege. Our client urges the fullest investigation of the facts as presented by the meagre evidence. The amount involved is large. The plaintiff will reap a large reward. The defendants have acted in good faith, have expended much money in actual preservation of the property. Plaintiff has done nothing. Some twenty of the best business men in the city of New Orleans, with the best legal talent to advise them and one of the best notaries to frame 254 their written acts, are in effect adjudged guilty of inattention to the simplest forms of business. What they did was either stupidity or rascality, or else it was done in error.

The facts in this case have as direct a bearing upon the issue as they do in a case of simulation or fraud.

They involve:

1°. Notice of bankrupt proceedings.

2°. The ratification and confirmation of acts ostensibly done for a secured creditor by one holding the evidence of debt good in the hands of any holder on which no other claims were recorded.

3°. The truth of the allegation that there was a serious error of fact under which all the other secured creditors acted, which was the real motion for their course.

In the bankrupt proceeds of Paul Cook & Co., Marshall J. Smith was chosen the trustee of the creditors. He was the agent of Mrs. Mary Murphy at the time and long afterwards, and held the notes. See record, page 162, Mrs. Murphy's own testimony. Notice to him was notice to her. He could not divest himself of the knowledge of the fact of such notice. See Factors' & Traders' Insurance Company vs. Marine Dry Dock and Ship Yard Company, 31 A. 152; 38 Barbour, 527.

"These officers having taken advantage of their position as
255 officers to practice a fraud upon the plaintiffs by wrongfully con-
cealing their certificates of stock and transferring it in new form
to others, things which they could only by reason of their official position, the corporation is undoubtedly liable for their acts." 38 Barbour, 527.

If Marshall J. Smith did not inform the other secured creditors that his firm in liquidation did not own the notes that he held; there was a constructive fraud practiced upon them, and surely there was an error in fact underlying all the acts of the other secured creditors in the premises.

The clause in the act of mortgage relative to the effect of the mortgage is "in favor of the said Samuel L. Moss and to inure to the use and benefit of any and all future holder or holders of said notes." See rec., page 9.

No amount of search would have found any evidence of Mrs. Murphy's claim on the notes. That knowledge was in the possession of Mrs. Murphy and Marshall J. Smith and Thos. A. Archer only.

How or where could the Insurance Company find that Mrs. Murphy had any claims on the notes? Not by search, not by the records. The
holders of the notes must be considered the owners at that time;
256 the laches, if any there were, are those of the real owner or else there
is fraud.

Your honors' attention is moreover called to the prayer of the plaintiffs' petition. It prays for a personal judgment, and that plaintiff's mortgage be recognized by sale of the property to pay the debt.

The prayer is not in the alternative. It is for a personal judgment and mortgage recognition. There is a seeming inconsistency in the prayer.

Is it possible that so many men of any business reputation would intentionally work the destruction of their secured rights?

If not, then there was an error of fact as to the legal rights of the representatives of those notes to do what was done in the Paul Cook & Co. bankrupt proceedings.

Paul Cook & Co. had given a mortgage for $40,000 on this property. The insurance company certainly held and owned the notes for $20,000 that were secured by that mortgage; Marshall J. Smith & Co. in liquidation also held mortgage. The bankrupt proceedings show this. See pages 65 and 137 for signatures of each.

Some person held the notes for the other $20,000 secured by that
mortgage. This is undisputed. But the ownership of those
257 notes is undisputed. There was nothing in the mortgage or the
notes that indicated the ownership of Mary Murphy. The notes

were good in the hands of any holder. The act of mortgage stipulates this fact. These notes to the amount of $20,000 were not overlooked. The act of mortgage fixed the amount secured, and no one can believe that one-half of the notes so secured were not held and produced in such important bankrupt proceedings.

They were represented by Tho's A. Archer, liquidator, were held by him, and would have asked if Mr. Brown or Widow Jenkins, or anybody else owned them, when so presented. We say presented, because it would do violence to the intelligence of such men as William M. Randolph and P. C. Couvillier, than whom none ranked higher in their professions, to say that the notes were not produced. The register in bankruptcy must demand the evidences of debt. He is an officer of court, and must be presumed to have done his duty. Then there is Harmon Doane, the then president of the insurance company, Ed. A. Palfrey, secretary of it, C. J. Leeds, Archibald Mitchell, B. Egan, Mathew W. Logan, John Hennesy, and many others interested to a large amount. Were they all so stupid as to leave one-half of $40,000
entirely unrepresented and to deliberately work the destruction
258 of all their secured claims, pay larger taxes, for taxes were high
in those days, enormous bankrupt court charges, and deprive
themselves of second claims? It has been argued by plaintiff's counsel that the property is valuable. We assert that it is not. If it could have been sold for any reasonable sum it would not have been kept. The judgment demands about $39,000. Nine years' additional taxes have been paid.

Surely these men acted from proper motives and wisely.

Mr. Randolph, Mr. Cuvillier, and Mr. Doane, the three most active in the whole proceedings are dead. They cannot speak for themselves. Why was not this suit brought during the time that the voice of each could be heard in defense. It was not brought until one week before the accruing of prescription upon the notes, and until witnesses were dead and voiceless.

They could not add their evidence to that of Marshall J. Smith and Mr. Archer. If they could, she would not have dared to dispute the word of such gentlemen. As it is she is outweighed in evidence by four credible witnesses. The weight of evidence we respectfully urge should be decreed against her. And she was the plaintiff examined as a witness by the defendant at the suggestion of Mr. Smith, who was very confident that she would support him. He surely would not have
sought her examination if he had imagined that she would so
259 directly contradict him, and say that he had said things she
never heard before.

She was deeply interested. Women are poor witnesses to facts. The members of this court have had large experience at the bar, and will judge if this is a rash assertion.

All the secured creditors of Paul Cook & Co. were supposed to be acting for their mutual protection.

That was their motive in having a trustee. They selected Marshall J. Smith. He was supposed to represent one-half the mortgage debt because he held the notes, and must be considered as the owner by that fact. Perhaps he told them that he or his firm owned them. It would have been rather stupid to have asked that question when he held them. Who would have asked the Factors' and Traders' Insurance Company's president if he owned the $20,000 in notes that he held, or if some bank or other insurance company owned them?

There is no ground for the presumption that all of these intelligent business men of large experience, acting under the best legal advice to be had, with the notes actually in the possession of Marshall J. Smith & Co., or such firm in liquidation, through Thos. A. Archer, as Mrs. Murphy testifies on page 162, had any idea that all the secured creditors were not represented in those proceedings for the sale of
260 *of* the property of Paul Cook & Co. They acted for the best interests of all secured creditors, as they supposed.

If they did not have all of the secured creditors so represented then there was a most serious error of fact on the part of those secured debts before them, and Mrs. Murphy contributed to such error.

She should be charged with contributing to said negligence, if there was any, and the other creditors, who were in fact guilty of no laches, should not be forced to see her rewarded for her act of negligence or constructive fraud.

Errors of fact can only be proved by evidence. We were prohibited by the lower court from proving it.

Until an error is proved to be such, it is not known to be an error. Investigation finds truth or error as a result. Assertion proves nothing.

It is admitted that a written power of attorney is necessary to authorize an agent to buy or sell real estate. It is begging the question, however to say that in this case an agent was buying or selling real estate.

On the contrary, the evidence of everybody that has testified in this case shows that certain notes amounting to $20,000, on their face good, were in the hands of the holders, Marshall J. Smith, with no title
261 or mortgage recorded that could show any right of any other person thereto. Therefore the mortgage creditors were acting as prudent business men when they had the property of Paul Cook & Co. sold and adjudicated.

Marshall J. Smith & Co., in liquidation, were not secured creditors of those bankrupts unless they held these notes. They had no other secured claim. (Pages 65 and 137.) Either they intentionally led the other secured creditors into doing what they did, that is, they either practised a fraud on the other secured creditors or on Mrs. Murphy, or else they were acting in good faith, and the other secured creditors, with no means of learning better, were under a most serious error of fact.

The property was actually conveyed to Marshall J. Smith by the bankrupts. (See deed, pages 63 and 64.) Now, if he was the owner for all legal purposes, was he not notified of the ownership of the notes and the mortgage rights? If he was not, he could not be better informed. The actual holder of these notes, Marshall J. Smith & Co., in liquidation, signed with others, "We hereby give our assent to the execution of the above deed." (Record, pages 65 to 137.) If not, is it true, as mentioned on page 66, that three-quarters in value of all the creditors of the bankrupts were represented?

262 Thos. A. Archer alleges that he acted solely as the agent of Mrs. Murphy in all that was done. (See his answer, pages 91 and 92.) It would seem that he should be permitted to prove it by direct evidence.

In the case of Barriere v. Peychaud, 14 A., 371, in a case similar to this in many respects;

"The conduct of plaintiff creates the impression that he was willing to allow Gauthier to represent him until the other creditors had consented to the compromise, and then that he intended to deny the agency of Gauthier, and seek to collect the whole amount of his debt.

"If plaintiff can succeed, it would certainly work a great injustice to the creditors who were parties to the compromise, and also to the indorsers of Peychaud, for the former consented to the release, without doubt, upon the supposition that all who held notes drawn and indorsed by him and Hebrard had agreed to the compromise, and that the property and future exertions of Peychaud would be devoted to the payment of thirty per cent. only upon those debts; and the indorsers, Deverges, Forstall and Deloche doubtless were influenced by the idea that the property and labors of Peychaud would suffice to guarantee them against loss by being responsible for thirty per cent.
263 although they might not be, if any particular creditor should be paid in full."

"Gauthier is a competent witness to prove acts done within the scope of his agency. The objection, on the ground of his liability to actions for damages and the costs of this suit, if he falsely represented as agent, goes simply to his credibility. 1 Greenleaf on Evidence, sec. 416, Phillips, vol. 1, p. 52; 1 An., 399; 4 An., 409; Ibid, 540."

"If Gauthier was not so authorized it was his duty to have repudiated the agreement as soon as he was notified of it. He did not do so. He is therefore presumed to have ratified it, and is bound by it."

Mr. Archer's testimony establishes some facts; page 98:

Q. "Mr. Archer you had the notes in your possession at the time of the sale?

A. "At the time of the sale I had the notes in my possession.

Q. "These identical notes sued on here?

A. "Yes, but they were placed by me in a bank box belonging to Mrs. Murphy, but in my possession; those are the two notes that were in my possession, but placed in Mrs. Murphy's bank box.

Q. "Had you the key to the bank box?

A. "Yes, sir; I had one key and she had the other."

Page 99:

Q. "And she approved and ratified what had been done?

264 A. "Well, she made no objection. She came to see how the matter was progressing, and she wanted to know everything about it. I was merely acting as a friend in the matter, and I believed I was doing the best for her interest in every sense of the word.

Q. "Did she ever say anything or do anything that indicated that she repudiated anything that you had done?

A. "Never, until Mr. Coleman told me so since he has had charge of this case."

He conveys the idea that he was only acting as her friend by this last testimony. Surely it will not be believed that the secured creditors would have acted as they did if they had thought of the possibility that Mr. Archer or Mr. Smith was imposing on them such a representation as his mere friendship for Mrs. Murphy.

Then he conveys the idea that there was never any doubt abou Mrs. Murphy's ratification and authorization. Here is ground-work enough for the recognition of the error in fact that is alleged, and to remand the cause to have evidence on the point, if there was no other evidence on that point.

Again, on page 100, Mr. Archer was asked:

Q. "Did she know who bought in the property?

A. "Yes, sir; ; and I was representing Mrs. Murphy, at least that was my belief at the time."

On page 101:

265 Q. "Did you explain to her what interest was s'cured *secured* to her?

A. "Yes, sir; I did. I told her that she would have her pro rata with other mortgage and privilege creditors."

The evidence of Marshall J. Smith is direct, straightforward, and important, and it is evident that he was convinced that Mrs. Murphy agreed to, knew of, and ratified the acts in the premises, intended to simply preserve her mortgage rights as to the date of the bankrupt proceedings; that her rights were concurrent with those of the insurance company, and were so understood until, as Mr. Archer said, she began to deny it. Years afterwards Mr. Smith expected her to sustain his evidence, and not tell the court that he said things she never heard of before.

We ask the court to reread all of his testimony, beginning on page 111: "He had known her 20 years.

Q. "Who attended to her business after her husband's death?

A. "I held her power of attorney from the time that he died until the son arrived at the age of majority."

He expressed perfect willingness to produce it when it was called for, and plaintiff's counsel, as the case was continued on that day, did not demand it again, neither did Mr. Smith appear to testify again. It was a notarial act.

His absence is accounted for by sickness, when plaintiff's attorney waived his appearance. Record, 139.

266 Record, page 112.

Evidence of Marshall J. Smith:

"Q. Do you know anything about those notes Col. Smith, that are now in suit here?

"A. Yes, I know all about them.

"Q. Who purchased those notes for Mrs. Murphy?

"A. I did.

"Q. Who held those notes, or did you hold them; and, if so, how long did you hold them?

"A. I held them as her power of attorney in my office among other papers, up to the time her son arrived at the age of majority."

Record, page 113:

"Did you ever have any interview with Mr. Murphy after you made the sale of the property of Paul Cook & Co., in bankruptcy?

"A. Yes, sir.

"Q. State explanation, if any, you made to her in reference to that transaction.

"A. I can't give the exact words of the explanation, but I explained to her time and time again how the transaction stood, how the records stood. But time and time again, before I gave up the power of attorney, I would explain to her all these matters, and she would come up and ask me how it was her property was not sold and when the property would be sold. I explained to her the pressed condition of real eslate, and the interest she had in the property, and so far as I could see, if she understood anything, she understood her interest.

267 "Did you or did you not explain to her and represent to her that the property was bought for her account?

"A. Yes, sir, I always explained it to her so. * * * * * I think it is about two months ago that she came to me and said that she would like to sell her interest.

* * * * * * * "I never attended personally to Mrs. Murphy's business since, but I went around to Mr. Archer and got him to go and see Mr. Palfrey, to see if he would not buy the notes. She understood as thoroughly as any one her interest; it was no fault of mine what her interest was, and I wanted to get her something, because when the property comes to be sold there will be very little for any of them. I have been anxious for her to get something.

"Q. Did you represent to her how her interest was secured?

"A. I have represented it to her as well as a man could possibly explain to a person. I explained it to her in the presence of her son and he understands."

Is not this to be credited? Is it not reasonable?

"Q. Did you explain to her?

"A. Certainly, just as far as I was able."

Record, page 116.

* * * * * "I think the whole amount was some $65,000, and that she had a proportion of $20,000 in this property that was bought in.

"Q. You mean the entire amount of $20,000?

268 "A. Not $20,000, because she knew very well that if the property wouldn't bring it she couldn't get that amount. She knew very well what her interest is. She is an honest, upright woman, and when you ask her for the truth she will tell you."

Record page 117:

"Q. Did you represent to her that the property was bought for herself and the other creditors?

"A. I never had any other interview with her. I can't tell you the exact words, or the language used, but the idea conveyed all the time by me to her every time she asked me in regard to the matter was exactly that the property was bought in to save her interest.

"Q. With the other creditors?

"A. Of course."

Is the evidence of Thos. A. Archer and Marshall J. Smith to be believed? It is reasonable, probable, and is strengthened by that of Col. Palfrey and Mr. Castell, and these four persons are contradicted by no one in particular, save Mrs. Murphy, who is a most interested witness (the plaintiff). Her evidence is unreasonable, improbable, and very contradictory. It is that of a woman that knew nothing of business, and who admits that Mr. Archer and Mr. Smith had attended to her business.

They would have had nothing to do with these proceedings unless they had represented her and held the notes; and if they represented themselves as the holders of the notes good in the hands
269 of any holder there is fraud, and the secured creditors were led into serious error of fact. On page 157 Col. Palfrey says, "I understood Marshall J. Smith held the notes." Mr. Castell says Marshall J. Smith held Mrs. Murphy's full power of attorney, a notarial *page*." Page 148.

We urge your honors to examine the evidence of Mrs. Murphy again, and see if it can be believed.

Can your honors believe that Mrs. Murphy held $20,000 in notes of a bankrupt concern—that had no property save that mortgaged to secure the notes in double that amount with other privileges on it—and never asked about the property or the sale? The notes were worthless without the security. This she certainly knew. And she certainly watched the proceedings and sale and her large interests, and asked about everything over and over again.

Mrs. Murphy's evidence, beginning on page 162:

"Q. When did Marshall J. Smith become your agent, do you remember?

"A. After my husband's death.

"Q. Can you remember when that was, madam; about what year?

"A. It is six years next August or September.

"Q. That would make it about 1870?

"A. Yes, sir.

"Q. How long did Col. Smith remain your agent?

"A. Until my son came of age.

"Q. You remember how long that is now?

270 "A. I think 1872, the 27th November.

"Q. When did you get your bank-box from Col. Smith? Do you remember what time that was? Was it some time after your son became of age?

"A. Yes, sir, soon after; in the beginning of January, the next year, 1873.

"Q. Did Col. Smith have a key to your bank-box?

"A. There was two keys. Mr. Archer stated he had one.

"Q. Those notes were in that bank-box?

"A. Yes, sir; the notes were in the bank-box.

"Q. Who was it told you that?

"A. Mr. Smith always told me about the sale. I knew nothing about it; they never told me. I never asked him, for I knew nothing about it.

"Q. Who was your representative?

"A. It was Mr. Smith that was the agent.

"Q. Who first told you about the property being sold?

"A. I heard them all say that they bought it.

"Q. Who said so?

"A. I heard Mr. Archer said so.

"Q. Where?

"A. He said so at our house.

"Q. Did he inform you then that it was bought for all the creditors?

"A. No, sir.

"Q. Did you never ask what your interest in that property was, and to have put down in *in* writing, so you would know?

"A. No, sir.

"Q. Did Mr. Smith explain it to you?"

271 "A. No, sir.

"Q. No one explained this to you?

"A. No, sir; except Mr. Coleman. I employed him?

"Q. Didn't you understand from them that the property had been sold at the bankrupt sale, and that you would have to take a certain proportion?

"A. No, sir. Mr. Coleman is the only one ever gave me any information.

"Q. You knew the property had been sold at a bankrupt sale?

"A. Yes, sir; but I held my notes, and my notes were worth the money all the time. That is what I understood.

"Q. Did you ever ask what the property sold for?

"A. No, sir; I heard it.

"Q. Who from.

"A. Wasn't it in the papers? I heard it.

"Q. Who told you how it was in the papers?

"A. My son, that had an interest in that.

"Q. Did you ever talk to Mr. Smith or to Mr. Archer about the sale?

"A. Mr. Archer soon left after the sale, and I didn't see him except once when he was sick in bed, when his wife sent me word to come, and there was no talk about it then.

"Q. Did you never talk to Mr. Smith about it?

"A. When I asked Mr. Smith, he always had some trouble or something else to do; he said he wished he never had anything to do with it."

272 Notice how she evades answering these last questions:

"Q. You heard of the sale?

"A. I heard of the sale when I seen Mr. Coleman. He understood all about it, and it was the first time I knew of the sale.

"Q. Do you know when the sale of this sugar refinery of Paul Cook & Co. took place?

"A. I don't remember.

"Q. Did you hear it read from the papers?

"A. No, sir; I heard it ou'side among the people.

"Q. Have you heard Marshall J. Smith testify here on the last occasion when this case was fixed?

"A. I heard him says things that I never heard before until I heard it here.

"Q. Did you hear him say that he had talked to you and informed you of the sale?

"A. No, sir; he never informed me or talked to me.

"Q. Did you hear him say so?

"A. I did hear him say so."

The evidence of Mrs. Murphy's son is of no weight. He knew nothing; never did any business.

Who could tell from her evidence that anybody but Mr. Marshall J. Smith represented her?

Who could tell from her evidence alone when she first heard of the sale? She contradicts herself over and over again as to when and
273 how she learned it. Such evidence should not outweigh that of four men of credibility. It is miserably weak.

Mrs. Murphy, by her evidence on page 170, says her son told her of the sale. On 171 she says it Mr. Coleman first told her of it, and on 174 she heard it outside among the people; and on 178 she says, "I never heard of the sale until Mr. Coleman told me of it lately. On 179 she says she heard of it when he bought it, and on 187 that her children talked about it.

This is of full contradiction, and it is about as indefinite as an old lady's description of an event that she said in the course of her narrative occurred "last night," "before breakfast yesterday morning," "about ten o'clock in the afternoon."

Surely no such testimony will break down straightforward, business like, reasonable evidence of men whose enlightened selfishness would guide them better. Then there is the evidence of four business men, opposed by one woman.

The inducement for the secured creditors was to get the property free from encumbrances. Such a sale was ordered. The property was only fit for a special use, and so they must preserve it until it could be well sold. That sale was homologated by the bankrupt court, page 197.

274 Upon error of fact, we ask your honors to examine C. C., 1823, (1817), 1825 (1819) of 1896 (1890), 1826 (1820); 16 A., 294; 19 L., 140; 12 R., 302; 15 A., 268–270.

If there be no such cause where one was supposed to exist, or if it be falsely represented, there can be no valid consent.

C. C., 1824 (1818), 1827 (1821), 5 N. S., 260, 6 L., 511. See also C. C., 1838 (1832), 4 L., 456. C. C., 1839 (1833), 1840 (1834), 1847 (1841).

"It is based also upon error of facts, and that error was a common error both to the bank and themselves, and induced by the acts of the bank as well as of Marchais."—10 A., 376.

"The price stipulated for the plaintiff's pretensions was a large one, and in case of a doubt we would incline in favor of a party strong to avoid loss against one seeking to obtain again."—17 L., 448; Theriot vs. Chaudron et al. See. 13 A., 477; 31 A., 100; 31 A., 52, 725, 149; 29 A., 320, 274. Rec. S., 1942, 2903.

We urge your honors to examine the bankrupt law upon the point of proving up claims. No secured creditor could prove up such claims and retain his security. (See proceedings In re Maria L. Barron, of the United States court, in district and circuit court of Louisiana; also § 5103 bankrupt act, formerly 43 In re Darbey, 4 B. R., 211, 309; In re Zim, 4 Benedict, 500; In re Trowbridge, 9 B. R., 274.)

Mrs. Murphy's own agent was the trustee. She had notice,
275 and we refer again to the 38 Barbour, 527; and 31 A., 152.

On ratification, we beg your honor's careful attention to the authorities, to be found on page 8 of the brief of Singleton & Brown.

Those authorities found on page 9 of their brief seem to be quite in point:

20 A., 215, Mangum vs. Bill.
22 A., 496, Ball vs. Binder.
24 A., 462, Oliver vs. Johnson.

See what is said on page 9 of that brief on transfer, and why Archer's name as liquidator of Marshall J. Smith & Co. was used.

In conclusion, we urge yours honors to review this whole case and reread the evidence.

The defendant insurance company, realizing the fact of your honors' judgment, and knowing that all that it has done has been done in good faith and with the single purpose of benefiting all of the secured creditors, feels that it has been led into the position your honors have placed it, when no search, foresight, or business management could have prevented it. Either Marshall J. Smith and Thos. A. Archer knowingly deceived the secured creditors and made false representations to them, or they did not. In either event the result is the same. There was a most serious error of fact that caused these creditors to do what they
did. If Smith or Archer caused this wrong Mrs. Murphy is
276 as much to blame, as she left the notes good in the hands of any
third holder with them, which caused the wrong to defendants. Courts remand causes and give new trials in their discretion for the purposes of justice, and it is respectfully submitted that justice can only be meted out to these litigants by a full and fair trial on the error of fact to be proved by evidence.

If there was no error of fact that can give defendants relief, and meet the ends of justice, equity. and law, then was not Mrs. Murphy, considering the character of the notes and her acts, fully notified of all the bankrupt proceedings of Paul Cook & Co.? We think so. Her evidence is weak, contradictory, and at times evasive. It is not the kind of evidence to give her any relief. That of the other witnesses is strong, reasonable, and shows a most probable course of action, and it is the evidence of Marshall J. Smith, Thos. A. Archer, Edward A. Palfrey, and W. J. Castell, backed by the equities of the case. The strongest presumptions exist, so far as Wm. M. Randolph and P. C. Couvillier are concerned, of a correct, consistent, professional course in this business under their charge. No men stood higher in their professions.

In the doubt as to what was done that must impress every
277 reader of the transcript, should not the defendants who are striving to prevent a great loss have the benefit, rather than one who testifies as plaintiff does and produces no ground of equity to sustain her claim?

We firmly believe it to be a large legal speculation of hers. Her counsel we hold in high esteem.

Respectfully submitted.

(Signed) GIBSON, HALL & MONTGOMERY,
Counsel for Insurance Co.

SYLLABUS.

1°. Knowledge of a trustee in bankruptcy that notes transferable by delivery are owned by any one is knowledge of the agent who holds them when that agent is also the trustee in bankruptcy; and it is notice and knowledge for the real owner, so far as other creditors are concerned, who deal in good faith with such agent, believing him to be the owner: 31. A, 152; Factors' and Traders' Insurance Company vs. Marine Dry Dock Company, and 38 Barbour, 527, and other authorities quoted in the brief; Bankrupt Act of 1867, § 5103 C. C., now 3343 on third persons.

2. Ratification of acts done by another for the benefit of any person can be proved by him or the one that acted, by parole or written evidence: 21 N. Y., 225; Commercial Bank vs. Jones, 18 Texas;
1 N. Y., 444; 46 Maine, 176; 33 Com., 95; 4 Allen, 447; 3
278 Laws, 174; 32 Ill's, 387; 7 Hump, 224; 20 A., 90; 3 A., 464; 6
A., 540; 18 A., 546; 29 A., 679; 20 A., 215; 22 A., 496; 22 A., 462.

When an error of fact is such that the truth or falsity involves the motive for a sale or contract the establishment of such error of fact, like an allegation of fraud, is permitted by the introduction of evidence under great latitude, and its proof will set aside the contract for sale: C. C., 1825, 1896, 1824, 1827, 1838, 1839, 1847; 19 L. 140; 12 R., 302; 15 A., 268, 270; 5 N. S., 260; 6 L., 511; 4 L., 456; 17 L., 448; 10 A., 376; 13 A., 477.

4° In case of doubt courts incline in favor of a party striving to avoid loss against one seeking to obtain a gain: 17 L., 448.

Supplemental brief of Factors' & Traders' Insurance Company for a rehearing.—Filed April 9, 1881.

Supreme court of Louisiana.

MRS. MARY MURPHY
vs.
THE FACTORS' & TRADERS' INSURANCE COMPANY & als.
No. 6399.

SYLLABUS.

A note drawn to the order of the maker, and by him endorsed in blank secured by act of mortgage, with the clause, "and to enure to the

use and benefit of any and all future holder or holders," is transferred by delivery from hand to hand, and a transaction made in good faith with such holders concerning such note is binding and valid, possession protecting the sale, pledge, or other disposi-
279 tion thereof; the possession of such paper carries the *the* title
with it to the holder. The possession and title are one and inseparable: 2 Wal., 110; Murray vs. Lardner, 20 A., 264; Dall vs. Rezitti, 26 A., 15; Gioranorich vs. Citizens' Bank, 2 Parsons on Bills, 272, 279; 20 How., 843; 22 How., 96; 18 A., 192; Jackel vs. Fried, 20 A., 75; Wheeler vs. Marllot, 20 How., 343; Louque's Digest, page 88.

In venturing to ask for a rehearing of this case we beg to call the attention of the court to one view of the case which appears to have escaped consideration in their learned and elaborate opinion.

We do not deem it worth to restate the facts, for they have already been set forth in the brief on file, and are familiar to the court.

We simply desire to submit this proposition, that these notes were endorsed in blank, "to enure to the use and benefit of any and all future holder or holders of the said notes," and that as such possession carried ownership, that physical possession of such notes is amply sufficient to justify third parties in treating with the holders thereof. Not only is this law, but the custom of commerce regards the possession and presentation of such notes as sufficient to bind the notes in any transaction concerning them.

It is a matter, therefore, of indifference whether Marshall J.
280 Smith & Co. were the agents of others or not. They appeared
in every stage of the transaction before the bankrupt court, at the meeting of the creditors, and throughout the proceedings with reference to them, as in possession of the notes in controversy, and they were therefore entitled to be regarded by our client and all the parties as qualified to deal with the said notes. It occurs daily that merchants in their business appear with such notes, sell them, pledge them, or dispose of them as they see fit. If it be contended now that in all such transactions third parties whose names nowhere appear in the notarial act of mortgage—parties wholly unknown—should be permitted afterward to intervene and set up their claims to be the real owners of such notes, the foundation of *of* commercial intercourse and freedom in respect to this class of negotiable paper would be destroyed.

If such notes be lost they should be advertised and notice given to the world of said loss. But if such notes be entrusted to agents, and innocent third parties bind themselves with respect to the notes, enter into important business relations on the appearance of them, and assume weighty obligations, if mutual concessions are made by the holders, it does appear to us that it cannot be held, in justice or in law, that one set of notes shall be irrevocably bound and that
281 the other set, concurrent with them, shall be released, and that all
the burdens and losses shall be imposed upon one party, and that the other party shall not only be exempt but entitled to cover solely and exclusively rights and privileges which were originally shared alike and distributed equally between them.

If Marshall J. Smith & Co. were in possession of these notes, and we acted upon this knowledge, the notes they held or represented were bound, and all the obligations mutually assumed by him and us are binding upon the four concurrent notes.

It must be borne in mind that the transactions were concerning these notes—commercial paper which carried ownership and delivery from hand to hand—and that, therefore, we were not put on inquiry, and had no reason in the world to imagine that any unknown person would afterwards come in and be permitted to avail themselves of the concessions we had made in good faith and only upon the ground that similar concessions were being made with respect to the notes concurrent with ours.

The case of Murray vs. Lardner in 2 Wallace, 110, contains a full review and interpretation of the law:

"The possession of such paper carries the title with it to the
282 holder. The possession and title are one and inseparable."

"The law is settled that a holder, coming fairly by a bill or note, has nothing to do with the transaction between the original parties."

When the bill has passed to the plaintiff with any proof of bad faith in him there is no objection to his title.

On page 122 of 2d Wallace the court says: "We are well aware of the importance of the principle involved in this enquiry. These securities are found in the channels of commerce everywhere, and their volume is constantly increasing. They represent a large part of the wealth of the commercial world. The interest of the community at large in the subject is deep-rooted and wide-branching. It ramifies in every direction, and its fruits enter daily into the affairs of persons in all conditions of life. While courts should be careful not so to shape or apply the rule as to invite aggression, or to give an easy triumph to fraud, they should not forget the considerations of equal importance which lie in the other direction. In Miller vs. Race, Lord Mansfield placed his judgment mainly on the ground that there was no difference in princip*al* between bank notes and money. In Grant vs. Vaughan he held that there was no distinction between bank-notes and any
other commercial paper. At an early period his far-reaching sa-
283 gacity saw the importance and bearings of the subject."

(20 A., 264, Dall vs. Rizetti; 26 A., 15, Gioranich vs. Citizens' Bank; 2 Parsons on Bills, 272, 279; 20 Howard, 843, 343; 22 Howard, 96; 18 A., 192, Jeckel vs. Fried; 20 A., 75, Wheeler vs. Maillot; Louque's Digest, page 88.)

It is possible that our clients could have surrendered the mortgage by which the notes were secured without consideration? Will it be held that a gentleman like Harmon Doane, president of the Factors' & Traders' Insurance Company, and by the advice and guidance of a counsellor so able and accomplished as Wm. M. Randolph, could have come forward and consented to the cancellation of his mortgage right in favor of an unknown party, so that now the said party may come in, and appearing on behalf of the identical notes which were in the hands of Marshall J. Smith & Co. when we treated with them, be allowed to avail himself of the very stipulations we had been induced to make, under the conviction and knowledge that both sets of notes were of equal rank and dignity, so that our mortgage shall be cancelled, and theirs shall absorb every particle of property, by which both were secured and made valuable?

Such is the effect of the decree, which we beg this honorable court to review.

Does the testimony establish the fact upon which this view is
284 based? Were the notes in controversy in possession of Mar-
shall J. Smith & Co., and did they, while in such possession, enter into the transaction by which our client relinquished certain rights

on the concurrent notes held by them in consideration of certain rights being conceded on the other two notes?

There was a mutuality of concessions. Will it be held that our concessions thus made are binding, but the others are not?

What is the evidence?

Page 9. Mr. Archer (of Marshall J. Smith & Co.) “You had the notes in your possession at the time of the sale?

“A. At the time of the sale I had the notes in my possession.”

Page 112. “Do you know anything about those notes Col. Smith (of Marshall J. Smith & Co.), that are now in suit here?

“A. Yes, sir; I know all about them.

“Q. Who purchased those notes for Mrs. Murphy?

“A. I did.

“Q. Who held those notes, or did you hold them, and if so, how long did you hold them?

“A. I held them as per power of attorney, in my office among other papers, up to the time her son arrived at the age of majority.”

Page 162. Mrs. Murphy.

“Q. When did Marshall J. Smith become your agent, do you remember?

285 “A. After my husband's death.

“Q. Can you remember when that was, madame—about what year?

“A. It is six years next August or September.

“Q. That would make it about 1870?

“A. Yes, sir.

“Q. How long did Col. Smith remain your agent?

“A. Until my son came of age.

“Q. You remember how long that is now?

“A. I think 1872, the 27th of November.

“Q. When did you get your bank-box from Col. Smith? Do you remember what time that was? Was it sometime after your son came of age?

“A. Yes, sir; soon after, in the beginning of January, 1873. * * *

“Q. Did Col. Smith have a key to your bank-box?

“A. There was two keys; Mr. Archer stated he had one.

“Q. Who had the keys?

“A. I had a key and he had a key.

“Q. Those notes were in that ban*d*-box?

“A. Yes, sir; the notes were in the bank-box.

“Q. When you got it?

“A. Yes, sir.”

Page 65. In the proceedings in bankruptcy of Cook & Vairin, Marshall J. Smith & Co. actually sign as follows: “We hereby give our assent to the exten*t*ion of the above deed, Marshall J. Smith & Co., in
liquidation, reserving mortgage privilege,” and Harmon Doane
286 also signs: “Factors' and Traders' Insurance Company, reserving mortgage privilege, Harmon Doane, president.”

We find Marshall J. Smith & Co. appearing before the register in bankruptcy as the holders of these notes, precisely as Harmon Doane appeared, representing the notes of the Factors' & Traders' Insurance Company.

Page 66. It appears that Marshall J. Smith was not only recognized as holding them, but was by virtue of that fact selected from among the creditors of Paul Cook & Co., bankrupt, whose property was mortgaged to secure these notes, to be the trustee of the creditors.

Page 61. The order of the United States court, signed by E. H. Duel, recognizes Marshall J. Smith as trustee, and confirms and homologates said sales and proceedings, showing judicially the position held by Marshall J. Smith, as being possessor of the notes in controversy.

At the very time that Marshall J. Smith & Co. were thus acting and participating prominently in all these proceedings, they had actual possession of the very notes with regard to which the tranactions took place. Every act, therefore, they performed with regard to these notes
while in their possession was valid and binding upon the notes.
287 Justice cannot be done the insurance company without a rehearing. It is earnestly prayed for.

Respectfully submitted.

(Signed) GIBSON, HALL & MONTGOMERY,
Att'ys for Factors' and Traders' Ins'ce Co.

Opinion on application for rehearing..—Filed 11*th April*, 1881.

MRS. MARY MURPHY
vs.
FACTORS' AND TRADERS' INS'E CO. & ALS. } No. 6399.

Mr. Justice POCHÉ:

Defendants' counsel, in two able and exhaustive briefs, strenuously urge upon us the reversal of our decree in this case, and glowingly picture the great hardships inflicted upon their clients by the judgment rendered.

We have carefully perused a second time the voluminious evidence in the record, and we have failed to find any testimony showing conclusively that Mrs. Murphy was legally represented in the matters of the bankruptcy proceedings, the adjudication at the trustee's sale, and the subsequent sale to the Factors' & Traders' Insurance Company, and that therefore she was bound by any of these transactions.

But in their briefs for a rehearing, defendants' counsel press the following proposition, which they support with great force, and cogent
reasoning: That the Murphy notes being endorsed in blank
288 and being secured by mortgage to enure to the benefit of any
and all future holders of the said notes, and being in the possession of Marshall J. Smith & Co. during all these transactions, are facts which justified third parties in treating with the holders of the notes, to consider them as owners thereof; and hence they conclude that for the purposes of the issue in this case it is a matter of indifference whether Marshall J. Smith & Co. were the agents of others or not in the various transactions referred to.

It is evident that in their zeal for argument, counsel entirely lost sight of their pleadings by which, at least, they must be bound.

Their answer rests exclusively upon the alleged theory that Mrs. Murphy was bound by the acts of Marshall J. Smith & Co., her duly-authorized agents and attorneys in fact, having, as such, the exclusive possession, management, and control of her said mortgage notes, and stipulating in her behalf in all the transactions covered in the issue of this case all the testimony which they offered and introduced on that point was intended for the sole purpose of establishing the agency of Marshall J. Smith & Co. touching the two notes which were thro' the pleadings and throughout the trial, recognized and treated as the property of Mrs. Murphy.

289 We transcribe from their answer the following averment, out of many similar allegations on this point:

"Defendants aver that the two notes of plaintiff herein were and had been in the possession of Marshall J. Smith & Co., or of Marshall J. Smith individually, who had been for a long time, and was at the date of these transactions, the only qualified attorney in fact of Mrs. Murphy."

Under such an allegation defendants could not have been allowed to show by evidence that the notes had been treated as the property of Marshall J. Smith & Co., and much less can they now be tolerated in their attempt to shift their position in the last engagement of this protracted conflict.

We find no error in our decree, and the application for rehearing must be denied.

Decree on application for rehearing.—Extract from minutes.

MONDAY, *April* 11, 1881.

The court was duly opened, pursuant to adjournment.

Present, their honors Edward Bermudez, chief justice, and Felix P. Poché, Robert B. Todd, Wm. M. Levy, Charles E. Fenner, associate justices.

290 His honor, Justice Poché, pronounced the judgment and decree of the court in the following case:

MRS. MARY MURPHY
vs. } No. 6399.
FACTORS' & TRADERS' INS'E CO. & ALS.

On application for rehearing.

We find no error in our decree, and the application for rehearing must be denied.

Petition for writ of error.—Filed 12th April, 1881.

WIDOW MARY MURPHY
vs. } No. 6399.
FACTORS' & TRADERS' INS'CE CO. & ALS.

Supreme court of Louisiana.

To the honorable Edward Bermudez, chief justice of the supreme court of Louisiana, and his associate justices.

The petition of the Factors' & Traders' Insurance Company, one of the defendants herein, of which Edward A. Palfrey is president, a corporation duly incorporated under the laws of Louisiana, respectfully shows:

That this action was commenced in the fifth district court for the parish of Orleans, March 16th, 1876, for the purpose of compelling the defendant insurance company, E. E. Norton, assignee in bankruptcy of Paul Cook & Co., and Paul Cook and Justus Vairin, jr., and Marshall J. Smith, trustee of said creditors of said bankrupts, in solido,
291 to pay twenty thousand dollars with 8 % per annum interest from March 21st, 1871, until paid, 5 % attorney's fees, with spe-

cial mortgage on the property fully described in the act of mortgage which was made a part of the petition, and to have Mrs. Mary Murphy's alleged mortgage declared executory, and the property sold to satisfy said debt claimed as due, and to extinguish the claim of said defendant insurance company as mortgage-creditor on said property, to declare that the insurance company, said defendant, had become the owner of the property so mortgage' by purchase under proceedings in said bankruptcy of Paul Cook & Co., and that the said insurance company must pay said debt of $20,000, interest &c., or abandon the property as owners to Mrs. Mary Murphy, alleged mortgage-creditor thereon, in lieu of payment of said debt by mortgage note.

Your petitioner alleges that in the original petition and answer, it was averred, and in addition, that on the 21st February, 1871, Paul Cook & Co. were adjudicated bankrupts on their own petition in the United States court for the district of Louisiana, and surrendered the Orleans Sugar Refinery, the property concerning which this suit is brought, and the right, title, interest, and immunity to which is in dispute, as among their assets; that pursuant to an order of the
292 said United States district court, the creditors of Paul Cook &
Co. met, in conformity with section 43 of the act known as the bankrupt act of the United States, approved March 2d, 1867, and the amendment thereto, and at that date decided to have its affairs wound up by a trustee, under the inspection and direction of a committee of creditors; that at the time of the meeting of the creditors for the purpose of appointing a trustee, Marshall J. Smith was the agent of Mrs. Mary Murphy, plaintiff in this case, and had in his possession as such, the mortgage notes sued on in this case; that Marshall J. Smith, her agent, was appointed trustee; Leeds Greenleaf, Carl Kohn, and Harmon Doane were selected as the committee of creditors; that the resolution was filed May 31st, 1871, and approved by the bankrupt court on the 20th June, 1871; that on the day of December, 1871, the trustee, under the direction and advice of the committee of creditors, applied to the said United States district court for an order to sell the property upon which the mortgage now sought to be executed, existed; that the bankrupt court, on the 1st of December, 1871, in conformity with the request of the trustee, directed said property to be sold free of all encumbrances; that plaintiff, Mrs. Mary Murphy had notice of such proceedings through her attorneys and Marshall J. Smith, and that she acted
293 through him concurrently with the other creditors of said bank-
rupts; that the property was sold in conformity with the order of court free of all encumbrances, and was bought in by the Factors' & Traders' Insurance Company for the benefit of all the mortgage creditors; that the State court has held, notwithstanding Mrs. Mary Murphy had no notice of these proceedings in bankruptcy, that her mortgage was not released, and has condemned the said property to be sold to satisfy the said mortgage debt; that the defendants, plaintiff in error herein, relied upon, and aver that the proceedings in the United States district court, in the bankruptcy of Paul Cook & Co., were proper, valid, and binding on her; that Mrs. Mary Murphy, plaintiff, was bound thereby; that the State court holds that the mortgage of Mrs. Mary Murphy, the plaintiff in this case, is not cancelled and erased, but is still pending and existing; that the mortgage of the plaintiff in error, defendant in this case, concurrent with Mrs. Mary Murphy's has been held by the State court to have been erased and cancelled under these proceedings; that in holding that the mortgage of Mrs. Mary Murphy is still alive, good, and binding on the property, notwithstanding the

proceedings in the bankrupt court, and that the Factors' and Traders' Insurance Company's mortgage is extinguished, the right, title, interest, and immunity which the Factors' and Traders' Insurance
294 Company has and had, by the proceedings in said bankruptcy proceedings, and in conformity to the laws of the United States, are by said decision invalidated and destroyed, and that one of the questions at issue in this case is, whether the proceedings had in the bankrupt court are legal and binding, and all the requisites of the same have been complied with or not, and that the decision of the supreme court of the State of Louisiana is against the right, title, interest and immunity set up and claimed by the plaintiff in error herein, under the bankrupt law of the United States, an act approved March 2d, 1867, and amendments thereto, and that the plaintiff in error is entitled to have the cause reviewed by the Supreme Court of the United States.

That judgment having been rendered by said district court for the parish of Orleans against defendants, an appeal was taken by defendants, and especially this one now plaintiff in error, to the supreme court of Louisiana, which is the highest State court of law and equity in which a decision could be had, and said judgment was amended in particulars not essential, and affirmed by said State supreme court of La., as by the opinion and decree of the aforesaid supreme court of La. will fully appear.

Petitioner shows that he is entitled to a writ of error to the Supreme Court of the United States from said final judgment, and consid-
295 ering the bond herein filed, to have it operate as a supersedeas, and he prays that the same may be granted according to law; that all parties to the original suit be cited; that the accompanying bond be approved, and a citation signed, and for general relief and all needed orders in the premises.

(Signed) GIBSON, HALL & MONTGOMERY,
Att'ys for Plaintiff in Error.
SINGLETON & BROWN, *of Counsel.*

Affidavit.

Edward A. Palfrey, being duly sworn, says that he is president of The Factors' & Traders' Insurance Company, plaintiff in error, and that the facts and allegations of the above petition are true and correct.

(Signed) E. A. PALFREY.

STATE OF LOUISIANA,
City of New Orleans:

Subscribed and sworn to before me this thirteenth day of April, A. D. 1881.

(Signed) EDWARD IVY, *Not. Pub.*

Order.

Writ allowed, to operate as a supersedeas. Bond approved.
New Orleans, April 16th, 1881.

(Signed) E. BERMUDEZ,
Chief Justice.

296 *Writ of error.—Filed April 25th*, 1881.

Supreme court of the State of Louisiana.

THE FACTORS' AND TRADERS' INSURANCE CO., plaintiff in error, *vs.* WIDOW MARY MURPHY & ALS., DEFENDANTS in error.	No. 6399.

Copy of the writ of error lodged in the clerk's office of the supreme court of the State of Louisiana, in pursuance of the statute in such cases made and provided, this 25th day of April, one thousand eight hundred and eighty-one.

Gibson, Hull & Montgomery, attorneys for plaintiffs in error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Louisiana, greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said supreme court of the State of Louisiana, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Widow Mary Murphy, plaintiff, and the Factors' and
Traders' Insurance Company, E. E. Norton, assignee of Paul
297 Cook & Co., composed of Paul Cook and Justus Vairin, jr., and
Paul Cook and Justus Vairin, jr., individually, bankrupts, Marshall J. Smith, trustee of creditors of Paul Cook & Co., and Paul Cook and Justus Vairin, jr., individually, bankrupts, defendants, and Leeds & Co., warrantors; Percy Roberts, assignee of Lagan & Mackison, warrantors, bankrupts; John Hennessy, warrantor, and T. A. Archer, individually and as agent, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such, their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Factors' and Traders' Insurance Company, as by its complaint appears: we, being willing that error, if any hath been, should be duly
corrected, and full and speedy justice done to the parties aforesaid
298 in this behalf, do command you, if judgment be therein given, that
then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 19th day of April, in the year of our Lord one thousand eight hundred and eighty-one.

[SEAL.] (Signed) F. A. WOOLFLEY,
Clerk of the Circuit Court of the United States for the Eastern District of Lou siana.

Bond for writ of error.—Filed 16th April, 1881.

WIDOW MARY MURPHY
vs.
THE FACTORS' & TRADERS' INS'CE CO' & ALS. } No. 6399. Bond.

Know all men by these presents that we, the Factors' and Traders'
Insurance Company as principal and John Chaffe & Sons, R.
299 M. Walmsley, and Louis Bush as sureties, of the city of New
Orleans and State of Louisiana, are held and firmly bound unto Widow Mary Murphy, of the city of New Orleans, and her executors, administrators, heirs, and assigns in the sum of sixty-one thousand ($61,000) dollars, lawful money of the United States of America, for which payment, well and truly to be made to the party last aforesaid and her executors, administrators, heirs, and assigns, we bind ourselves jointly and severally and each of our executors, administrators, heirs, and assigns firmly by these presents. Sealed with our seals and dated the 11th day of April, 1881.

Whereas the said Factors' and Traders' Insurance Company has presented and prosecutes a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court of Louisiana:

Now, the condition of the above obligation is that if the defendant insurance company in the said cause, the Factors' and Traders' Insurance Company above named, shall prosecute the said writ of error to effect and answer all costs and judgment in principal and interest and
charges if he shall fail to make good his plea, then this obliga-
300 tion shall be void; otherwise to remain in full force, virtue, and
effect.

(Signed) ED. A. PALFREY,
President Factors' & Traders' Insurance Company.
(Signed) JOHN CHAFFE & SONS,
For the Amount of Twenty Thousand Dollars.
(Signed) R. M. WALMSLEY,
For Twenty Thousand Dollars.
(Signed) LOUIS BUSH,
For Twenty-one Thousand Dollars.

We, the undersigned, who have signed as sureties on this bond, being duly sworn, allege and say that we are each of us worth the amount for which we have so signed as sureties over and above our debts and liabilities.

(Signed) JOHN CHAFFE,
" R. M. WALMSLEY.
" LOUIS BUSH.

STATE OF LOUISIANA,
City of New Orleans :

Subscribed and sworn to before me this thirteenth day of April, A. D. 1881.

(Signed) EDWABD IVY, *Not. Pub.*

Bond approved.

(Signed) E. BERMUDEZ,
Chief Justice.

301 *Clerk's certificate.*

UNITED STATES OF AMERICA,

Supreme court of the State of Louisiana.

I, George W. Dupré, clerk of the supreme court of the State of Louisiana, holding sessions at the city of New Orleans, do hereby certify that the foregoing three hundred pages contain a full, true, and complete copy of the transcript of the proceedings had in fifth district court for the parish of Orleans in a certain suit wherein Mrs. Widow Mary Murphy was plaintiff and the Factors' & Traders' Insurance Company & others were defendants, and also of all the proceedings had in the supreme court on the appeals taken by said Factors' & Traders' Insurance Company & others, which appeal is now on the files thereof under No. 6399.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the city of New Orleans, this 24th day of June, anno Domini one thousand eight hundred and eighty-*eight*, and in the one hundred & fifth of the Independence of the United States of America.

[SEAL.] GEORGE W. DUPRÉ, *Clerk.*

302 *Certificate of the judge.*

UNITED STATES OF AMERICA:

Supreme court of the State of Louisiana.

I, Edward Bermudez, chief justice of the supreme court of the State of Louisiana, do hereby certify, that George W. Dupré, is clerk of the supreme court of the State of Louisiana, holding sessions in the city of New Orleans, and the signature of George W. Dupré to the within certificate is in the proper handwriting of him the said clerk; that said certificate is in due form of law, and that full faith and credit are due to all of his official acts as such.

In testimony whereof I have hereunto set my hand and seal, at the city of New Orleans, this 24th day of June, anno Domini one thousand eight hundred & eighty-one, and in the one hundred & fifth year of the Independence of the United States of America.

[SEAL.] E. BERMUDEZ,
Chief Justice.

303 WIDOW MARY MURPHY
vs.
THE FACTORS' AND TRADERS' INSURANCE' COMPANY et al. } 6289.

Supreme court of Louisiana.

To the honorable Edward Bermudez, chief justice of the supreme court of Louisiana, and his associate justices.

The petition of the Factors' and Traders' Insurance Company, one of the defendants herein, of which Edward A. Palfrey is president, a corporation duly incorporated under the laws of Louisiana, respectfully shows: that this action was commenced in the fifth district court, for the parish of Orleans, March 16th, 1876, for the purpose of compelling the defendant insurance company, E. E. Morton, assignee in bankruptcy of Paul Cook & Co., and Paul Cook and Justus Varin, jr., and Marshall J. Smith, trustee of said creditors of said bankrupts, in solido, to pay twenty thousand dollars with 8 % *per cent.* per annum interest from March 21st, 1871, until paid, 5 % *per cent.* attorneys' fees with special mortgage on the property fully described in the act of mortgage, which was made a part of the petition, and to have Mrs. Mary Murphy's alleged mortgage declared executory, and the property sold to satisfy said debt claimed as due and to extinguish the claim of said
304 defendant insurance company as mortgage creditor on said property, to declare that the insurance company, said defendant, had become the owner of the property so mortgaged by purchase, under proceedings in said bankruptcy of Paul Cook & Co., and that the said insurance company must pay said debt of $20,000, interest, &c., or abandon the property, as owners, to Mrs. Mary Murphy, alleged mortgage creditor thereon, in lieu of payment of said debt by mortgage note.

Your petitioner alleges that in the original petition and answer it was averred, and in addition that the evidence adduced on trial of the cause shows, that on the 21st of February, 1871, Paul Cook & Co. were adjudicated bankrupts on their own petition, in the United States court for the district of Louisiana, and surrendered the Orleans Sugar Refinery, the property concerning which this suit is brought, and the right, title, interest, and immunity to which is in dispute, as among their assets; that, pursuant to an order of the said United States district court, the creditors of Paul Cook & Co. met in conformity with section 43 of the act known as the bankrupt act of the United States, approved March 2, 1867, and the amendments thereto, and at the date decided to have its affairs wound up by a trustee, under the inspection and direction of a committee of creditors; that at the time of the meeting of the creditors for the purpose of appointing a trustee,
305 Marshall J. Smith was the agent of Mrs. Mary Murphy, plaintiff in this cause, and had in his possession, as such, the mortgage notes sued on in this case; that Marshall J. Smith, her agent, was appointed trustee, Leeds Greenleaf, Carl Cohn and Harmon Doane, were selected as the committee of creditors, that the resolutions were filed May 31st, 1871, and approved by the bankrupt' court, on the 20' of June, 1871; that on the   day of December, 1871, the trustee, under the direction and advice of the committee of creditors, applied to the said U. S. district court for an order to sell the property upon which the mortgage now sought to be executed existed; that the bankrupt court on the first of December, 1871, in conformity with the request of the

trustee, directed said property to be sold free of all encumbrances, that plaintiff Mrs. Mary Murphy, had notice of such proceedings, through her attorneys and Marshall J. Smith, and that she acted through him concurrently with the other creditors of said bankrupts; that the property was sold in conformity with the order of court free of all encumbrances, and was bought in by the Factors' and Traders' Insurance Company, for the benefit of all the morgage creditors; that the State court has held, notwithstanding, that Mrs. Mary Murphy had no notice of these proceedings in bankruptcy, that her mortgage
306 was not released, and has abandoned the said property to be sold
to satisfy the said mortgage debt; that the defendant plaintiff in error herein, relied upon and aver that the proceedings in the United States district court, in the bankruptcy of Paul Cook & Co., were proper, valid, and binding on her; that Mrs. Mary Murphy, plaintiff, was bound thereby; that the State court holds that the mortgage of Mrs. Mary Murphy, the plaintiff in this case, is not cancelled and erased but is still existing; that the mortgage of the plaintiff in error, defendant in this case, concurrent with Mrs. Mary Murphy's, has been held by the State court to have been erased and cancelled under these proceedings, that in holding that the mortgage of Mrs. Mary Murphy is still alive, good, and binding on the property, notwithstanding the proceedings in the bankrupt court, and that the Factors' and Traders' Insurance Company's mortgage is extinguished, the right, title, interest, and immunity which the Factors' and Traders' Insurance Company has and had by the proceedings in said bankruptcy proceedings, and in conformity to the laws of the United States, are by said decision invalidated and destroyed; and that one of the questions at issue in this
307 case is whether the proceedings so had in the bankrupt court,
under the statutes of the United States, are legal and binding, and all the requisites of the same have been complied with or not, and that the decision of the supreme court of the State of Louisiana is against the right, title, interest, and immunity set up and claimed by the plaintiff in error herein under the bankrupt law of the United States, an act approved March 2, 1867, and amendments thereto, and that this plaintiff in error is entitled to have the same reviewed by the Supreme Court of the United States.

That judgment having been rendered by said district court for the parish of Orleans, against defendants, an appeal was taken by defendants, and especially this one, now plaintiff in error, to the supreme court of Louisiana, which is the highest State court of law and equity in which a decision could be had, and said judgment was amended in particulars not essential, and affirmed by said State supreme court of La., as by the opinion and decrees of the court aforesaid, the supreme court of La., *court* will fully appear.

Petitioner shows that it is entitled to a writ of error to the Supreme Court of the United States from said final judgment, and considering the bond herewith filed to have it operate as a supercedeas, and
308 he prays that the same may be granted according to law; that all
parties to the original suit be cited; that the accompanying bond be approved, and a citation signed, and for general relief, and all needed orders in the premises.

GIBSON, HALL & MONTGOMERY,
Att'ys for Plaintiff.
SINGLETON & BROWNE,
Of Counsel in Error.

Edward A. Palfrey, being duly sworn, says that he is president of the Factors' and Traders' Insurance Company, plaintiff in error, and that the facts and allegations of the above petition are true and correct.

ED. A. PALFREY.

STATE OF LOUISIANA,
City of New Orleans :

Subscribed and sworn to before me this thirteenth day of April, A. D. 1881.

EDWARD IVY, *Not. Pub.*

Writ allowed to operate as a supercedeas. Bond approved. New Orleans, Ap'l 16th, 1881.

E. BERMUDEZ,
Chief Justice.

(Indorsed :) 6399. Supreme court of La. Mary Murphy vs. The Factors' & Traders' Ins. Co. Petition for writ of error. Filed 12 April, 1881. T. McC. Hyman, d'y clerk.

309 UNITED STATES OF AMERICA, *ss :*

The President of the United States of America to the honorable the judges of the supreme court of the State of Louisiana, greeting :

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said supreme court of the State of Louisiana, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Widow Mary Murphy plaintiff, and the Factors' and Traders' Insurance Company, E. E. Norton, assignee of Paul Cook & Co., composed of Paul Cook, Justus Vairin, jr., and of Paul Cook and Justus Vairin, jr., individually bankrupts, Marshall J. Smith, trustee of creditors of Paul Cook & Co., and Paul Cook and Justus Vairin, jr., individually bankrupts defendants, and Leeds & Co. composed of Charles J. Leeds and John Leeds, warrantors, Percy Roberts, assignee of Lagan & Mackison, warrantors, bankrupts, John Hennessy, warrantor, and T. A. Archer, individually and as agent warrantor, wherein was drawn in question the validity of a treaty, or statute of, or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity ; or wherein was drawn in question the construction of a clause of the Constitution, or of a
310 treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission ; a manifest error hath happened to the great damage of the said Factors' and Traders' Insurance Company, as by its complaint appears : We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court, to be then and

there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 19th day of October, in the year of our Lord one thousand eight hundred and eighty-one.

[SEAL.] F. A. WOOLFLEY,
Clerk of the Circuit Court of the United States,
for the Eastern District of Louisiana.

Allowed by—

(Indorsed:) No. 6399. Supreme court of the State of Louisiana. The Factors' and Traders' Insurance Company, plaintiff. Widow Mary Murphy et als., defendants in error. Writ of error. Filed April 25, 1881. T. McC. Hyman, d'y clerk.

311 THE UNITED STATES OF AMERICA:

Supreme court of the State of Louisiana.

The President of the United States to T. A. Archer, individually and as agent, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Louisiana, wherein the Factors' and Traders' Insurance Company is plaintiff in error, and you and others are defendants in error, to show cause, if any there be, why the judgment rendered against the said Factors' and Traders' Insurance Company as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 25th day of April, in the year of our Lord one thousand eight hundred and eighty-one.

W. BERMUDEZ,
Chief Justice Supreme Court of the State of Louisiana.

(Indorsed:) No. 6399. Supreme court of the State of Louisiana. The Factors' and Traders' Insurance Company, plaintiff in error, vs. Widow Mary Murphy, et als., defendants in error. Citation to T. A. Archer, ind'lly, &c. Marshal's return. Supreme court of Louisiana. Filed 6 May, 1881. George W. Duprey, clerk.

312 THE UNITED STATES OF AMERICA:

Supreme court of the State of Louisiana.

The President of the United States to Widow Mary Murphy, E. E. Norton, assignee of Paul Cook & Co., composed of Paul Cook and Justus Vairin, jr., individually bankrupts, Marshall J. Smith, trustee of creditors of Paul Cook & Co., and Paul Cook and Justus Vairin, jr., individually bankrupts; Leeds & Co., composed of Charles J. Leeds and John Leeds; Percy Roberts, assignee of Lagan & Mackison, bankrupts; John Hennessy and T. A. Archer, individually and as agent, greeting:

You are hereby cited and admonished to be and appear at a Supreme

Court of the United States to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Louisiana, wherein the Factors' and Traders' Insurance Company is plaintiff in error, and you and others are defendants in error, to show cause, if any there be, why the judgment rendered against the said Factors' and Traders' Insurance Company, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 25th day of April, in the year of our Lord one thousand eight hundred and eighty-one.

W. BERMUDEZ,
Chief Justice Supreme Court of the State of Louisiana.

313 (Indorsed:) No. 6399. Supreme court of the State of Louisiana. The Factors' and Traders' Insurance Company, plaintiff in error, vs. Widow Mary Murphy et als., defendants in error. Citation to the defendants in error. Supreme court of Louisiana. Filed 6 May, 1881. George W. Dupré, clerk.

Marshal's return.

Received Apr. 25, 1881, by the U. S. marshal, and—

Received Apr. 25th, 1881, *by the U. S. marshal, and* I served true copies of the within writ of error on the defendants in error herein named in the following manner, to wit: Widow Mary Murphy personally, April 30th, 1881; E. E. Norton, assignee, &c., personally, May 2d, 1881; Marshall J. Smith, trustee, &c., personally, April 30th, 1881; Leeds & Co., personally on Chas. J. Leeds, a member of firm, April 29th, 1881; Percy Roberts, e'q., assignee, &c., personally, April 29th, 1881; John Hennessey, as agent, &c., personally, April 30th, 1881. T. A. Archer, I am credi*ta*bly informed, is dead, and I herewith return him not found, May 3d, 1881; and I can find no representative of his succession. All of the aforesaid defendants were served in their respective capacities as above set forth in the city of New Orleans, eastern district of Louisiana.

E. S. CURRY,
Deputy U. S. Marshal in & for Eastern District of Louisiana.

Personally appeared before me E. S. Curry, a deputy U. S. marshal in and for the eastern district of Louisiana, and makes oath that he served true copies of the within writ of error on the persons herein named as set forth in his official return hereon.

E. S. CURRY,
Deputy U. S. Marshal in & for Eastern District of Louisiana.

Subscribed and sworn before me May 3rd, 1881.

F. A. WOOLFLEY,
Commissioner United States Circuit Court,
Eastern District of Louisiana.

(Indorsement on cover:) No. 966. The Factors' & Traders' Insurance Company, plaintiffs in error, vs. Widow Mary Murphy et al. Louisiana sup. court. Filed October 8th, 1881.

○

111-738

SUPREME COURT U.S.
FILED
OCT 27 1881
JAMES H. McKENNEY, Clerk.

IN THE

Supreme Court of the United States.

October Term, 1881.

FACTORS' & TRADERS' INSURANCE CO.,
Pl'ffs in Error,
vs.
Mrs. MARY MURPHY, et al.
No. 966.

Motion to Dismiss or Affirm.

The defendant in this writ of error, Mrs. Mary Murphy, moves the court to dismiss the case for want of jurisdiction, and also to affirm the judgment on the ground that, although the record may show this court has jurisdiction, it is manifest the writ of error was taken for delay.

JAMES D. COLEMAN,
DURANT & HORNOR,
For Motion.

October 22, 1881.

Take notice that three weeks after service of copy of above motion we will move the court to dismiss the writ of error or affirm the judgment, for the reasons set forth in the said motion and accompanying brief.

JAMES D. COLEMAN,
DURANT & HORNOR,
For Motion.

Filed October 22, 1881.

BRIEF IN SUPPORT OF THE ABOVE MOTION.

This writ of error is directed to the supreme court of Louisiana, under R. S. U. S., 709, to review a judgment rendered January 31, 1881.

The suit in the State courts was brought against the plaintiffs in error, as third possessors, to subject certain real estate in the city of New Orleans to the mortgage held by Mrs. Widow Mary Murphy.

The defence is that the insurance company derives title to the property under a bankruptcy sale made by order of the U. S. district court for the district of Louisiana, *to which Mrs. Widow Murphy was a party.*

This is the central question in the case; indeed, it appears to be the only one, and was found by both the State courts, original and appellate, in favor of Mrs. Widow Murphy—*i. e.*, that she was no party, directly or indirectly, to the bankruptcy proceedings. This is a controverted question of fact, not law, and excluded from consideration here in such a motion as this. The history of the case in great and praiseworthy detail has been industriously and clearly set forth in the opinion of the supreme court of Louisiana on O. R., pp. 227–248, which we make a part of this argument, and which needs no addition or support from us. We think your honors will find it on examination, in all respects, satisfactory and conclusive.

But does the case present a Federal question raised by the pleadings and decided by "the highest court of the State in "which a decision of the suit could be had" *against* the title, right, privilege, or immunity specially set up or claimed by the insurance company?

The *prima-facie* right claimed by the plaintiff in error was freely conceded to them. Indeed, their title under the bankruptcy law existed IN FORM in the deeds and bankruptcy proceedings which they exhibited. But in substance and ingest their title was found to be void absolutely—a nullity—not under the particular principles of national laws and jurisprudence, but under a universal principle of all law—the right of every party to a suit to have an opportunity to be heard before he is condemned.

It is submitted, therefore, in this case that had the lower court found the bankruptcy proceedings orderly and valid, the decision would have been *against* Mrs. Widow Murphy, and she would then be entitled to a writ of error.

Lasère *vs.* Rochereau, 17 Wall., 437.

But as the lower court found the proceedings in bankruptcy to be void on a universal principle of law, the decision was in favor of Mrs. Murphy, and she would have no right to the writ.

The decision of the State court, therefore, involves no Federal question decided *against* the insurance company; for, if this were not so, a writ of error would lie in every case mentioned in R. S. U. S., 709, no matter whether decided in favor of or against the suitor; but this would be in direct contradiction to the words and intent of the law. And the real question raised and decided against the company involves the application of a simple principle of universal law lying entirely outside of R. S. U. S., 709; and of a decision based on such a principle your honors declare you have no jurisdiction.

Delmar *vs.* Insurance Co., 14 Wall., 661.

II.

But if on the first point we should be in error, then we claim the affirmance of the judgment on the ground that the writ of error here, *operating as a supersedeas*, was clearly taken for delay; and the question involved has been so often decided in this court and in the supreme court of Louisiana that no farther argument upon it is needed.

Ray *vs.* Norseworthy, 23 Wall., 128.
Haynes *vs.* Pickett, affirmed under the rule by your honors March 13, 1877, *et passim.*
Opinion Book, Oct. T., 1876, p. 635.
Louisiana Decisions, 21 An., 401.
25 Ib., 506.
28 Ib., 600, *et passim.*

Respectfully submitted.

DURANT & HORNOR,
JAMES DAVID COLEMAN,
Att'ys for Def't in Error.

WASHINGTON, D. C., *Oct.* 13, 1881.

111-738

OFFICE SUPREME COURT U.S.
FILED
DEC [illegible] 1881
McKENNEY, Clerk

IN SUPREME COURT OF THE UNITED STATES.

FACTORS AND TRADERS' INSURANCE COMPANY
vs.
MARY MURPHY ET AL.
No. 966.

Brief of P. Phillips in Reply to Motion to Dismiss.

On the 18 March, 1870, Paul Cook and Justus Vairin, Jr., executed their mortgage of certain real estate in the city of New Orleans to secure to S. S. Moss the payment of four promissory notes for $10,000 each.

On this property there was a sugar refinery on which liens, under the laws of the State, to a very large amount had attached.

On the 21 February, 1871, the mortgagors were adjudged bankrupts by the District Court of Louisiana.

By agreement of all the lien creditors the property was ordered to be sold, free of incumbrances, on 21 December, 1872, when it was adjudicated to Leeds & Co., Logan & Mackinion, John Hennessey, T. A. Archer, and the plaintiff in error for the sum of $45,000.

It having been agreed by the adjudicatees that it would be best for all parties that the title should be vested in the plaintiff in error, who was owner of two of the mortgaged notes, and who, for joint account, should discharge all costs, expenses, charges, taxes and other claims, a conveyance to this effect was executed on 20 June, 1873.

The sale was reported and confirmed by the District Court on 21 June, 1873. (P. 69.)

Three years subsequently, to wit, on 16 March, 1876, the defendant in error, Mary Murphy, filed her petition in the Fifth District Court of New Orleans, in which she claims to be the owner of two of the mortgage notes made by the mortgagors, payable to their own order, and indorsed by them.

After setting forth the proceedings in bankruptcy, and the vesting of the title in the plaintiff in error, the petitioner avers that she was no party to the proceedings, had no knowledge thereof, and was, therefore, not bound by them.

The defendants, in their answer, aver that the petitioner was fully represented by her agent or attorney, who made known to her the steps which were being taken in her favor, and that he frequently advised with her, and that she had knowledge of all that was being done, and freely assented thereto. (P. 10.)

On the trial, witnesses were produced to prove the allegations of the answer. This evidence was objected to by petitioner. The court ruled that the objection was well taken as to all that transpired before and at the time of passing the act, and to the insufficiency as to the evidence of agency, it not being in writing.

See Bill of Exceptions, p. 79.

On 21 June, 1876, a judgment was rendered in favor of petitioner for $20,000, and interest.

The two notes owned by plaintiff in error were held to be extinguished by confusion.

And it is further adjudged that the plaintiff in error pay the amount of the judgment to the petitioner, or deliver up to her the mortgaged premises.

An appeal was taken to the Supreme Court of the State, where the judgment of the Fifth District Court was amended "by limiting the same to the enforcement of the mortgage by seizure and sale, with the right reserved to the plaintiff in the event that the mortgaged property should not sell for sufficient to satisfy the judgment, to proceed in an action of indemnification against the defendant, the Factors and Traders' Insurance Company, for the recovery of the balance which may be due on said judgment to the extent of the value of the mortgaged property removed and disposed of by said defendant. (P. 109.)

In the opinion of the court, it is said:

"The evidence contained in the record fails to satisfy us that Mrs. Murphy was represented in the bankruptcy proceedings, the adjudication at the trustees' sale, the subsequent sale to the Factors and Traders' Insurance Company, or that she had notice of any of these matters. Without the fulfilment of these requirements, or her subsequent ratification, she cannot be legally bound, and her mortgage rights have not been destroyed or impaired." (P. 105.)

On a petition for rehearing, the Court, in its opinion, said:

"The answer rests exclusively upon the alleged theory that Mrs. Murphy was bound by the acts of Smith & Co., her duly duly authorized agents and attornies in fact, having as such the exclusive possession, management, and control of her said mortgage-notes, and stipulating in her behalf in all the transactions covered in the issue of this case.

All the testimony that was offered and introduced on that point was intended for the sole purpose of establishing the agency of Marshal J. Smith & Co. touching the two notes which were, through the pleadings and throughout the trial, recognized and treated as the property of Mr. Murphy."

The Court then declares that, under the pleadings, this evidence was inadmissible.

On this statement of facts, as shown by the record, we are now to answer the motion of defendant in error.

Jurisdiction.

The suit was brought to subject certain real estate held by defendants under a conveyance from the Court in Bankruptcy.

The judgment of the Court is against the title thus set up. *This is all that is necessary to confer the jurisdiction.*

The judgment was rendered on the ground that the Court was of opinion, from the evidence in the cause, that the petitioner had not been authoritatively represented in the bankrupt proceedings, and was therefore not bound thereby.

On this controverted fact this Court will be called upon to decide for itself when the case is tried on its merits, and if it should then be found that the court below correctly applied the evidence, the judgment will be affirmed. On the other hand, if the Court should find, from the evidence, that Mrs. Murphy was properly represented in the bankrupt proceedings, the judgment will be reversed.

The learned counsel who make this motion refer to the case of *Ray* vs. *Norseworthy*, 23 Wall., 128. But we submit that this case, so far from supporting their motion, is fatal to it.

There, as here, the State Court held the party not bound by the bankruptcy proceedings, as he was not a party thereto.

The case, coming here on writ of error, was heard on its merits, and the judgment affirmed.

Such a judgment could not have been rendered *if this Court had no jurisdiction of the cause.*

In *Gregory* vs. *McVeigh* this precise question was presented. The action was an ejectment. Gregory set up a title under a decree in confiscation proceedings. The court charged that McVeigh was not bound, as he was not a party thereto. Judgment being rendered for plaintiff, on writ of error sued out, a motion was made to dismiss, on the ground that such a decision did not involve a federal question.

By reference to the report of the case it will be seen that the jurisdictional question was sharply argued on both sides.

The court overruled the motion, holding that the proceedings in the District Court were under the authority of the United States, and its validity was drawn in question.
23 Wall., 294.

In *Dupasseur* vs. *Rochereau*, the general doctrine, as stated in the syllabus, is that—

> "When, in a State Court, a right or immunity is set up under and by virtue of a judgment of a court of the United States, and the decision is against such right or immunity, a case is presented for review under the act 5 February, 1867.

"In such a case the Supreme Court will *examine and inquire* whether or not due validity and effect have been accorded to the judgment of the Federal Court, and if they have not, it will reverse the judgment of the State Court."

21 Wall., 130;

See also *Green* vs. *Van Buskirk*, 7 Wall., 145;
Crapo vs. *Kelly*, 16 Wall., 610;
Sharpe vs. *Doyle*, 102 U. S., 686;
Osborne vs. *Bank U. S.*

We do not question the principle decided in *Ray* vs. *Norseworthy*, to wit: that to enable the bankrupt court to convey an unincumbered title to real estate previously mortgaged, it is indispensable that the mortgagee must have notice in some form, else the order will not conclude him.

Nor do we deny that the judgment of affirmance was fully justified by the evidence then before the court.

All that we insist upon and now repeat is that before the court can affirm the judgment in the case before it, it must be satisfied by the evidence in the record that it justifies the judgment.

The statute, authorising the writ of error, provides that such a judgment "may be *re-examined and reversed or affirmed.*"

This re-examination will not be had until the case is heard on its merits and not on a motion to dismiss.

We respectfully submit that the motion must be denied.

P. PHILLIPS,
For Plaintiff in Error.

111-736

IN THE SUPREME COURT
OF THE UNITED STATES.

October Term, 1881.

No. 966.

FACTORS' AND TRADERS' INSURANCE CO.,
Plaintiffs in Error,

versus

MRS MARY MURPHY, Et Al.

ON MOTION TO DISMISS OR AFFIRM.

Brief for Plaintiff in Error.

G. L. HALL,
Attorney for Plaintiff in Error.

J. S. Rivers, Stationer and Printer, 74 Camp St., N. O.

IN THE SUPREME COURT
OF THE UNITED STATES.

OCTOBER TERM, 1881.

No. 966.

FACTORS' AND TRADERS' INSURANCE CO.,
PLAINTIFFS IN ERROR,
versus
MRS. MARY MURPHY, ET AL.

ON MOTION TO DISMISS OR AFFIRM.

Brief for Plaintiff in Error.

The defendant in this writ of error, Mrs. Mary Murphy, has moved the Court to dismiss the case, "*for want of jurisdiction, and also to affirm the judgment on the ground that although the record may show this Court has jurisdiction, it is manifest the writ of error was taken for delay.*"

The latter ground, in its scope, involves a full consideration of the case, implies a necessity for its examination, that all parties should be heard, and admits that the Court has jurisdiction, while the first ground pleads want of jurisdiction.

The pleas are not in the alternative and are inconsistent.

The writ of error was granted by the Supreme Court of Louisiana, the highest court of law and equity in that State, in which a decision in a suit could be had, where is drawn in question the validity of a statute of, and authority exercised under the United States, and the decision is against their validity; and where a title, right, privilege and immunity is claimed under a statute of, and authority exercised under the United States, and the decision is against the title, right, privilege and immunity specially set up and claimed by the Insurance Company, plaintiff in error, under such statute and authority.

The judgment to be reviewed, that of January 31, 1881, interprets a United States Bankrupt Law, approved March 2, 1867, entitled, "An act to establish a uniform system of bankruptcy throughout the United States" and amendments thereto, and the effect upon the title or property acquired at a sale ordered by the United States District Court for the District of Louisiana, in the bankrupt proceedings of Paul Cook & Co, and the cancellation of a mortgage privilege thereon, under said statute and orders of said Court, and the validity of said bankrupt proceedings and the acts of said United States District Court and said statute.

The property was sold to the plaintiff in error by order of the United States District Court for the District of Louisiana, free from all encumbrances, after due and legal notice to all the creditors of Paul Cook & Co.

This defendant in error sues to enforce her mortgage privilege and rights on the property, notwithstanding such sale and notice, statute and action of the Court thereunder, and denies that her rights are affected thereby, and avers that said sale cancelled the mortgage privilege and rights of plaintiff in error on the property.

The plaintiff and defendant in error each hold a mortgage privilege for $20,000 with interest, of equal and concurrent rank on the property of the bankrupt, Paul Cook & Co.

The petition for writ of error to the Supreme Court of Louisiana is to be found on page 132 of transcript of record. It sets forth that the defendant in error claims the payment of the $20,000, interest, etc., or that plaintiff in error abandon the property to her, as alleged mortgage creditor thereon, in lieu of payment of said debt by mortgage note.

"Your petitioner alleges that in the original petition and answer it was averred, and in addition that the evidence adduced on trial of the cause shows, that on the 21st of February, 1871, Paul Cook & Co. were adjudicated bankrupts on their own petition, in the United States Court for the District of Louisiana, and surrendered the Orleans Sugar Refinery, the property concerning which this suit is brought, and *the right, title, interest and immunity to which is in dispute*, as among their assets; that, pursuant to an order of the said United States District Court, the creditors of Paul Cook & Co. met in conformity with section 43 of the act known as the bankrupt act of the United States, approved March 2, 1867, and the amendments thereto, and at the date decided to have its affairs wound up by a trustee, under the inspection and direction of a committee of creditors; that at the time of the meeting of the creditors for the purpose of appointing a trustee, Marshall J. Smith was the agent of Mrs. Mary Murphy, plaintiff in this cause, and had in his possession, as such, the mortgage notes sued on in this case; that Marshall J. Smith, her agent, was appointed trustee, Leeds Greenleaf, Carl Cohn and Harmon Doane, were selected as the committee of creditors, that the resolutions were filed May 31, 1871, and approved by the Bankrupt Court on the 20th of June, 1871; that on the —— day of December, 1871, the trustee, under the direction and advice of the committee of creditors, applied to the United States District Court, for an order to sell the property upon which the mortgage, now sought to be executed, existed; that the Bankrupt Court on the first of December, 1871, in conformity with the request of the trustee, directed said property to be sold free of all encumbrances, that plaintiff, Mrs. Mary Murphy, had notice of such proceedings, through her attorneys and Marshall J. Smith, and that she acted through him concurrently with the other creditors of said bankrupts; that the property was sold in conformity with the order of Court free of all encumbrances, and was brought in by the Factors' and Traders' Insurance Company, for the benefit of all the mortgage creditors; that the State Court has held, notwithstanding, that Mrs. Mary Murphy had no notice of these proceedings in bankruptcy, that her mortgage was not released, and has abandoned the said property to be sold to satisfy the said mortgage debt; that the defendant, plaintiff in error, herein, relied upon, and aver that the proceedings in the United States District Court, in the bankruptcy of Paul Cook & Co., were proper, valid and binding on her; that Mrs. Mary Murphy, plaintiff, was bound thereby; that the State Court holds that the mortgage of Mrs. Mary Murphy, the plaintiff in this case, is not cancelled and erased, but is still existing; that the mortgage of the plaintiff in error, defendant in this case, concurrent with Mrs. Mary Murphy's, has been held by the State Court to have been erased and cancelled under the proceedings: that, in holding that the mortgage of Mrs. Mary Murphy is stlll alive, good and binding on the property, notwithstanding the proceedings in the bankrupt court, that the Factors and Traders' Insurance Company's mortgage is extinquished, the right, title, interest and immunity which the Factors and Traders Insurance Company has, and had, by the proceedings in said bankruptcy proceedings, and in conformity to the laws of the United States, are by said decision invalidated and destroyed; and that one of the questions at issue in this case is whether, the proceedings so had in the Bankrupt Court, under the statutes of the United States, are legal and binding, and all the requisites of the same had been complied with or not, and that the decision of the Supreme Court of the State of Louisiana is against the right, title, interest and immunity set up and claimed by the plaintiff in error herein, under the bankrupt law of the United States, an act approved March 2, 1867, and amendments thereto, and that this plaintiff in error is entitled to have the same reviewed by the Supreme Court of the United States."

This writ of error was granted by the Suprme Court of Louisiana in the spirit and very words of the Revised Statutes of the United States. The broad views of jurisdiction of this Court are admirably set forth in:

20 Wallace, 590; Murdock vs. City of Memphis, 1st Otto, 113; Long vs. Cason.

In the original suit in the State Court, Mrs. Widow Mary Murphy, sues to enforce her mortgage privilege on the real estate that she admits was purchased

21 Wal, 138
21 Wal. 532
23 Wal. 294
12 otto 248
13 otto 90
13 otto. 554

by that plaintiff in error under proceedings, making the title, that were all carried on under the United States Statutes and in a United States Court.

That such Statute and proceedings conveyed it by a title perfect as a conveyance.

The plaintiff in error claims that it purchased the property free from encumbrance under the statute and order of said court.

In other words, the defendant in error claims that the United States statute and Court had full authority to convey the property by good title to the Insurance Company.

The main question, therefore, in this cause refers to a title to the Orleans Sugar Refinery acquired free from incumbrance, under the United States Bankrupt Law, approved March 2, 1867, and the proceedings in the United States District Court for the District of Louisiana. It is this title and the effect of this statute of the United States that is drawn in question. It is a controverted question of law disconnected from any question of fact.

The case presents a decision against the *title, right, privilege and immunity*, specially set up and claimed by the Insurance Company. If this Court has not jurisdiction in such a case, then State Courts might pass upon the title, right, privilege and immunity to nearly all the real estate sold and conveyed under the Bankrupt Law of the United States, approved March 2d, 1867, and the judgments of the various United

States Courts sitting in Brankruptcy, and a writ of error to this Court would not be invoked to protect the citizens of the United States, if all such titles were declared invalid by State Courts.

The assertion made by counsel for defendant in error that "this writ of error, operating as a supersedeas," to obtain which we gave a good and solvent bond for the sum of $65,000, "was clearly taken for delay," is neither fact nor argument. An inspection of this record will show that the Insurance Company has most earnestly defended this suit, and claimed the validity of its title.

Every line in these proceedings laden with the equity of the Insurance Company's cause.

They want a decision of the highest Court in the United States thereon, and not delay.

Respectfully submitted.

G. L. HALL,
Attorney for Plaintiff in Error.

111-738

Office Supreme Court U.S.
FILED
APR 24 1884

Supreme Court of the United States.

No. 340.—October Term 1883.

FACTORS' AND TRADERS' INSURANCE COMPANY, Plaintiff in Error,

vs.

WIDOW MARY MURPHY.

BRIEF FOR PLAINTIFF IN ERROR.

The question in this case is whether or not the Supreme Court will reverse the judgment of the State court, and maintain the validity and effect of the judgment of the Federal court.

On March 18, 1870, Paul Cook and Justice Vairin, jr., executed their mortgage of certain real estate in the city of New Orleans, consisting of fourteen lots of ground with buildings and improvements thereon, known and designated as the Orleans Sugar Refinery, to secure the payment of four promissory notes for $10,000 each, made payable to their own order and endorsed by them in blank. These notes were therefore payable to any holders of them.

On the 21st of February, 1871, the mortgagors were adjudged bankrupts by the District Court of Louisiana.

By agreement of all the lien creditors the property was ordered to be sold, free of all incumbrances, on the 21st of December, 1872, when it was adjudicated to Leeds & Co., Logan & Mackison, John Hennessy and T. A. Archer, and the plaintiff in error, for the sum of $45,000.

It was agreed by the adjudicatees that it would be best for all parties that the title should be vested in the plaintiff in error, (the Factors' and Traders' Insurance Company,) who was the owner of two of the mortgage notes, and who for *joint account* should discharge all costs, expenses, charges, taxes and other claims, and the conveyance to this effect was executed on the 20th of June, 1873, and a large sum was paid out by plaintiff in error under this agreement on *joint account*, to wit, $11,454.83, (R. 78.)

Among the creditors before the register, before the court, at the meeting of the creditors, in all the proceedings, appeared Marshall J. Smith & Co., a commercial firm composed of Marshall J. Smith and T. A. Archer, in possession of the other two notes, (for there were four concurrent notes,) acting on behalf of them, and were recognized as the holders throughout the entire transaction.

The sale thus agreed upon was reported and confirmed by the District Court on June 21, 1873. The matter stood thus settled to the satisfaction of all the creditors who had received notice and had appeared with the evidences of their indebtedness before the court, whose final judgment had been rendered after proper hearings and due consideration.

It was three years subsequent to these proceedings, to wit, on March 16, 1876, the defendant in error, Mary Murphy, filed her petition in the Fifth District Court of New Orleans, in which she claims to be the owner of two of the mortgage notes (the same that were represented by Marshall J. Smith & Co.) made by the mortgagors payable to their own order and endorsed by them.

The petitioner sets up the very proceedings in bankruptcy in which these very notes that she now claims figure in the hands of Marshall J. Smith and T. A. Archer, to show that the title to the property was vested in the plaintiff in error, and avers that she was no party to the proceedings, had no knowledge thereof, and was, therefore, not bound by them.

The defendants in their answer filed a general denial, and further aver that the petitioner was fully represented by her agent and attorney, who made known to her the steps which were being taken in her favor, and that he frequently advised with her and that she had knowledge of all that was being done.

The State court declared that the evidence offered to show this was inadmissible.

Now we contend that parol testimony should have been allowed to show not only that Marshall J. Smith & Co. held the notes when appearing before the register and the Bankrupt Court and at the meeting of creditors, but that they held them as the agent of Mrs. Mary Murphy, and that, being in possession of said notes and acting on behalf of them, their action was binding upon the notes and upon Mrs. Mary Murphy.

There is no law in Louisiana or anywhere else prohibiting parol testimony to establish agency with respect to commercial paper of this kind, or requiring persons to show their authority in writing to act as agents or otherwise in transactions respecting commercial paper indorsed in blank, secured by act of mortgage, with the clause "to inure to the use and benefit of any and all future holder and holders."

A transaction made in good faith with such holders concerning such notes is binding and valid, protecting the sale, pledge, or other disposition thereof. The possession carries the title with it to the holder, and transfer is made by delivery from hand to hand, (pp. 120, 122, 123, 124.)

If the notes were legally and duly represented by Marshall J. Smith & Co., a commercial firm composed of Marshall J. Smith and T. A. Archer,—if they appeared when notice was given to the creditors of the bankrupts, Paul Cook & Co., with these identical notes in their possession, before the register in bankruptcy, before the court, at the meetings of the creditors,—then all the proceedings had with respect to those notes and all the transactions in which they bore a part under the orders of the court, and confirmed by the court, must stand as valid and final.

We beg to refer to the proceedings before the court, the meetings of the creditors and the testimony in this record to show that the notes now claimed by Mrs. Mary Murphy were held by Marshall J. Smith & Co. with her knowledge and consent, and that they appeared throughout as creditors of the bankrupt solely on account of these notes.

These facts are established by the very documents and proceedings presented by the defendant in error to show the title of plaintiff in error to the property in question.

We pray, therefore, that the judgment of the State court may be reversed, and that the validity and effect of the judgment of the Federal court may be maintained.

R. L. GIBSON.

Supreme Court of the United States

No. ~~966.~~ 340.

THE FACTORS' AND TRADERS' INSURANCE COMPANY, *Plaintiffs in Error,*

vs.

WIDOW MARY MURPHY ET AL.

In Error to the Supreme Court of the State of Louisiana.

Brief for Plaintiff in Error.

G. L. HALL,
Of Counsel.

J. S. RIVERS, Stationer and Printer, [illegible] Camp St., N. O.

Supreme Court of the United States

No. 966.

THE FACTORS' AND TRADERS' INSURANCE COMPANY, *Plaintiffs in Error,*

vs.

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In Error to the Supreme Court of the State of Louisiana.

Brief for Plaintiff in Error.

G. L. HALL,
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Paul Cook and Justus Varin, Jr., made four notes of $10,000 each, on the 18th of March, 1870, payable one year after date, to their own order *in solido*, and by them endorsed in blank. Each of these notes was secured by mortgage on the property known as the Orleans Sugar Refinery, by act passed before Theodore Guyol, notary public, on that day. The Orleans Sugar Refinery was owned by Paul Cook & Co., which firm had Paul Cook and Justus Varin, Jr., for its members.

The Factors' and Traders' Insurance Company became the owners of two of those notes, and Widow Mary Murphy of the other two. Lagan & Mackison, Leeds & Co., and John Hennessey, had privileged claims on the Orleans Refinery that were recorded.

Paul Cook & Co., and the individual members of that firm, were adjudicated bankrupts on their own petitions, on Feb. 21, 1871, in the United States District Court, for District of Louisiana, No. 1113 of its docket. E. E. Norton was selected as assignee, and Marshall J. Smith was chosen trustee by the creditors, and confirmed.

The Orleans Sugar Refinery was sold by order of the bankrupt court, free *from all incumbrances*, through Nash & Hodgson, auctioneers, at public auction, on Dec. 21, 1872, *adjudicated to all of these privilege and mortgage creditors*, and the act of sale passed June 20th, 1873, before P. C. Cuvellier, notary public, the title being there made to the Factors' and Traders' Insurance Company.

The order of court, and the agreement of creditors holding a mortgage and privilege on the sugar refinery, show that the title was to be made in the name of the Factors' and Traders' Insurance Co., for the interest, use, and benefit of the other creditors holding a mortgage or privilege.

Widow Mary Murphy claims that the Insurance Company became the *sole* owner of the property by this purchase, and liable for the full amount of her notes, $20,000, with special mortgage on the property to secure them; that the mortgage of the Insurance Company became extinguished by confusion, when the Company became the owner; that the plaintiff, Mary Murphy, was no party to the sale; and that the other privilege creditors have renounced their rights also, by said sale to which they were parties.

Mrs. Murphy takes the bold position that there was a sale; that there were bankrupt proceedings in which the order for sale was obtained by the privilege and mortgage creditors of Paul Cook & Co; that everything was regular as to every one, whether bankrupt creditor or bankrupt debtor, in those proceedings, except herself; and that this sale is regular and binding upon every one but her, canceling and annulling every one's claim on said property, and leaving her mortgage intact, as a first and only mortgage. In fact, she claims that there was a sale for the purposes that best serve her views, and that there was none that conveyed the property, *as the order for sale provided*, free from incumbrances; that this sale to which she alleges she was no party, has placed her rights in a far better position then they ever were; that the costs and expenses of the bankrupt proceedings and the taxes paid on the property by the Insurance Company, and all claims that were prior to hers, amounting to $11,454.83, and the concurrent mortgage of the Insurance Company, have all been canceled, and that nothing can be allowed the Insurance Company for paying these prior claims on the mortgage property. *She pays* *no attention to the motive* that induced these mortgage and privilege creditors to bid in this property for $15,000, *for their own use and benefit*, and to carry on the proceedings; but prays that all these mortgage and privilege creditors be condemned *in solido*, with mortgage on the property, and that it be sold to pay her debt, now amounting to about $40,000.

The plaintiff's demand is not a modest one She asks, in the alternative, that as other relief, the property may be abandoned to her in lieu of getting other demands.

It is clear that if there was a sale, Mrs. Murphy's rights have been preserved intact, and that her claim has the same rank relative to other secured creditors that it always had, if she *was* no party to the sale or the bankrupt proceedings.

The bankrupt sale by public auction conveyed no greater rights than the bankrupt had.

EXCEPTION.

There was an exception filed by the Insurance Company that Mrs. Murphy was one of the adjudicatees at the sale and cannot bring this suit; that the notes were extinguished by the adjudication, and that her remedy is to follow the proceeds and recover from them her interest.

The evidence makes it clear that the whole proceedings were carried on under the firm belief that Marshall J. Smith & Co., through Thomas A. Archer, liquidator, or Marshall J. Smith, represented the notes. He held her notes up to January, 1873, Mrs. Murphy and her son testify, and Marshall J. Smith held her written power of attorney all this time, and Mr. Archer had the key to her bank-box in his possession, in which the notes were kept.

The refinery was sold at auction by Nash & Hodgson, auctioneers, on December 21, 1872, and adjudicated to all these privilege and mortgage creditors. If so, the interest she held as mortgage creditor was also extinguished by confusion, and the adjudication forces her to follow the proceeds of the sale of that property to obtain her *pro rata* interest in them as part owner. Smith and Archer testify that such was their understanding; so does Colonel Palfrey, president of the Factors' and Traders' Insurance Company, who was its secretary when the sale was made, and *Marshall J. Smith & Co. had no secured claim of their own on the refinery.* The exception, however, goes to the merits in its scope.

The answer of the Insurance Company contains first, a general denial, then admits the bankrupt proceedings, and that the title was taken by the Insurance Company, and avers that this adjudication was without any valuable consideration whatsoever, and for mutual accommodation; that the Insurance Company shall discharge all costs, expenses, charges, taxes, and other claims on the property; that all of the adjudicatees were either privilege or mortgage creditors, who took the property as the best method of protecting their claims; that they bid it in because they were such creditors, and that they would not have done so otherwise.

That Thomas A. Archer, liquidator of M. J. Smith

& Co., held the notes for $20,000; that he acted in the utmost good faith, and that he made known to Mrs. Murphy every step taken, when it was taken in her behalf, and frequently advised with her; that she had full knowledge of all that was done, and assented thereto; and that if this had not been so understood and believed, no such agreement would have been made; that since the sale, she having discovered that Marshall J. Smith & Co., in liquidation, were not privilege or mortgage creditors, she desires to take advantage of it, and to repudiate what was done for her; that the notes of Mrs. Murphy were in the possession of M. J. Smith & Co., in liquidation, and had been for a long time.

The answer then alleges that if Mrs. Murphy is not so bound, there is a serious and most material *error of fact* that must rescind the sale, and alleges that while all parties to the said sale believed that they, the privilege and mortgage creditors, were so acting, they paid for the benefit and advantage of the refinery, and for its care and preservation, costs, expenses, taxes, to the amount of $11,454.83, to wit:

Court costs, attorneys' fees, auctionneer's fees, and notary's fees..................	$3847 05
Taxes....................................	3114 65
Repairs....................................	768 13
Watchman, 52 months at $50 per month	2300 00
Trustee....................................	1125 00
Total..............................	$11,454 83

and that this sum with interest and privilege from December 17, 1873, when payment was made, should be allowed as first privilege on the property.

The Insurance Company avers that it is only part owner of the refinery, and denies any personal obligation, and avers that Mrs. Murphy's claim can only be enforced against the property or its proceeds to the extent of her *mortgage* interest, which is second in rank.

The Insurance Company calls all the other privilege creditors of Paul Cook & Co., bankrupts, in warranty, and asks that Archer, liquidator of Smith & Co., be declared agent of Mrs. Murphy, and and that she be decreed to be co-owner of the refinery, liable for her proportion of the privilege debts that rank hers, that have been paid, or *that the sale be rescinded for serious error of fact*, under the Louisiana Civil Code, Art. 1820 *et seq.*, constituting the motive for sale and purchase; and that the proceeds of the property be distributed by first paying the prior privilege claim for $11,454.83, and then dividing the balance among the other privilege and mortgage creditors.

The whole legal proceedings relative to the sale were under the personal supervision of the attorney for Marshall J. Smith, trustee, Mr. Wm. M, Randolph. The notary was P. C. Cuvellier. Both of these men are, unfortunately, dead. They stood very high in their respective professions, and were noted for careful attention to business details and integrity. It is proved that Marshall J. Smith had Mrs. Murphy's power of attorney as well as the notes, by the evidence of

W. J. Castell, the notary before whom it was passed; by Mrs. Murphy; by her son; by Marshall J. Smith; and by Mr. Archer. Marshall J. Smith & Co., in liquidation, had it and the notes when the proceedings in bankruptcy were carried on; when the trustee was selected; when the order of sale was obtained; when the adjudication was made by Nash & Hodgson, auctioneers, December 21, 1872.

Mrs. Murphy admits all this, and yet repudiates the sale, so far as she is concerned; claims that she was no party to it; and that such a sale took place and put her in a position that cancels all other privileges and mortgages on the refinery; that the sale was made to the Insurance Company only; and yet that all the other privileges and mortgages have been extinguished, and that costs and taxes, even if paid, cannot be allowed as a prior claim to hers.

Surely the Insurance Company could only purchase the right of Paul Cook & Co. to the property, subject to the mortgage, taxes, &c.

The $45,000 bid for the property was to be retained by M. J. Smith, trustee, until further orders of court.

The sale was confirmed by the bankrupt court on June 21, 1873. See page 69 of the record.

The conveyance to M. J. Smith, as trustee, is to be found on page 16, and the creditors assent on page 23, and the conveyance by auctioneers Nash & Hodgson on page 24. *It has frequently been decided by the Supreme Court of Louisiana that the adjudication by the auctioneer is a sufficient conveyance.* It was so conveyed and adjudicated when Marshall J. Smith & Co., in liquidation, held the power of attorney of Mrs. Murphy, and her notes, December 21, 1872. It was so conveyed free from incumbrance by order of the bankrupt court. 12 M. 335; 6 L. 550; C. C. 2157, § 2, 2586; C. P. 690-5; 11 L. 285. Hen. Dig. B. 80.

The judgment of the Supreme Court of Louisiana is to be found on page 214. It is in favor of Mrs. Murphy and against the Insurance Company, for $20,000, with eight per cent interest from March 21, 1871, and special mortgage on the refinery; decreeing that the Insurance Company mortgage is extinguished by confusion, or that the Insurance Company deliver the property to Mary Murphy; and rejects the whole of the $11,454.83, paid for costs, expenses, fees, and taxes. It confirms the sale made by the bankrupt court, which sale was confirmed by the bankrupt court.

Has Mrs. Murphy any such claim in law or equity? Has she done nothing for these long years relative to such a large and important claim of hers, that binds her? Has she, by express or implied consent, done nothing with her claim? Or did she always refrain from ratifying the acts of M. J. Smith & Co., and Archer, liquidator, and refuse her assent to any and everything that was done for her and on her account, either during the bankrupt proceedings, at the sale, or after it was made? Was there such serious error of fact in the sale as will authorize its rescision? Has the sum of $11,454,83 been paid for taxes, costs, expenses, in preserving, repairing, and caring for the property? The evidence will determine some of these points, but to the ruling of the lower court when certain evidence was offered there were taken several.

BILLS OF EXCEPTION.

he five bills of exception are to be found on page 78, *et seq.* The first four bills are taken by defendant. The last, or fifth bill. is taken by plaintiff. It is to the introduction of any parol evidence in support of the allegations in defendant's answer.

Under the first bill of exceptions, the Insurance Company shows that it was not permitted to prove that it had paid $11,454.83 for costs of Court, in the Bankruptcy proceedings, attorney's fees, auctioneer's fees, taxes of the State of Louisiana, a first claim on the property under the laws of Louisiana, for non-payment of which it could be sold. Sections 57, 58 and 59 of Act No. 58, Acts of La. Extra Session of 1870, repairs, watchman, and to the trustees appointed under the proceedings in the Bankruptcy proceedings of Paul Cook & Co. These are preference costs—expenses incurred to actually keep the property in existence, as Paul Cook & Co., surrendered control of it by their bankruptcy. La. Civil Code, Art. 3249, (3216), 3252, (3219). Without these proceedings, the sale would not have taken place, and they were absolutely necessary, under any and all circumstances. It is this sale that Mrs. Murphy invokes. If these taxes had not been paid, these repairs and expenses had not been made, this property would not have been preserved in kind to be the subject of this suit. The Insurance Company is entitled to the sum of money so paid, as a credit—when the property is sold and Mrs. Murphy is paid her *pro rata* of proceeds.

In support of the second bill of exceptions, it is only necessary to say that Mrs. Murphy claims, under the same act of mortgage, that the Insurance Company claims. It was one act, and the mortgage notes are concurrent. Her rights are based on the ground that the Insurance Company stands upon.

The third bill of exceptions is taken to the ruling of the Court—that the Insurance Company could not prove that Archer acted as agent of Mrs. Murphy, and that she knew of the purchase and intention to purchase at bankrupt sale and approved of the action of her agent, and assented to it over and again, and ratified it.

Mrs. Murphy is alleged to have had full knowledge of all the bankruptcy proceedings, and to have had much conversation with Mr. Archer about it, and to have had full knowledge of the sale, and to have approved it. And yet the Insurance Company was not allowed to prove it. Surely this ignorant woman did not fail to talk about her claim of $20,000, for about seven years, with the party that was her agent. The Insurance Company desired to show that it acted with Mr. Archer as the agent of Mrs. Murphy, and in no other capacity, and that he was liquidator of Marshall J. Smith & Co., *which firm had no privilege or mortgage against Paul Cook & Co., or the property sold.* It alleged that the motive for so proceeding to sell this property was because a mortgage creditor, Mrs. Murphy, had a mortgage for the same amount, secured by the same act of mortgage as its own, agreed to this as the best course to pursue, and so joined in under Articles 1824, (1818) and the four subsequent articles of the Louisiana Civil Code. The Insurance Company was entitled to this evidence.

The fourth bill of exceptions does not materially differ from the third. The ruling of the court was erroneous, for the same reasons, and further, because the question that Mr. Archer was asked to answer, was, "Who did those various parties represent in this transaction; the parties you have just named?" (Referring to a meeting of the mortgage and privileged creditors of Paul Cook & Co.) It was who did they represent, nothing more.

The simple statement of Mrs. Murphy's position in regard to the evidence is, that notwithstanding the specific allegations of defendant's answer, no proof could be given beyond the act of sale, even where a serious error of fact was alleged on making the sale, and where a very large sum is alleged to have been paid to extinguish claims of the first rank against the property, and prior in rank to that of Mrs. Murphy. It is a position to occupy, surrounded with danger, for Mrs. Murphy especially, as she is not able to read or write, and did not pretend to transact her business, except through Marshall J. Smith or Mr. Archer, and her silence, her perfect inaction, according to her own evidence, subjects her theory of defense to many perils and presumptions, if she does not undermine the ground she stands upon by her own evidence.

The fifth bill of exceptions is to the effect that Mrs. Murphy could not assent to, or ratify, or confirm the sale, because she was no party to it, and that it could not be received as proof, because she was not a party to the sale. This is strange, even taking her theory of this case. She claims to be a mortgage creditor. Surely, then, she could waive her right, and ratify and confirm the act of others, whether it was done in her interest or against it, so far as that property was concerned. What obstacle is there to her ratifying and confirming an act as having been done for her? Why could she not renounce her right to a first mortgage on a piece of property or to a claim against it? Certainly one can expressly and impliedly assent to a reduction of rank in mortgage claim, can renounce the first rank as a mortgage and take the second.

In the first ground of objection to evidence made by Mrs. Murphy she claims that the Insurance Company is the *sole owner of the property*; and then it is alleged that the *property was adjudicated to all the privilege and mortgage creditors.* This is quite inconsistent. It claims a certain kind of sale for one moment in the trial and another kind for the next moment. In fact, she alleges that the Insurance Company is the sole owner, and then admits that the property in the only sale alleged, was adjudicated to all the privilege and mortgage creditors. By one position she could claim that all privileges and mortgages held by those parties to the sale were extinguished by confusion, while by the other she could claim that only the Factors' and Traders' Insurance Company had extinguished its claim or mortgage.

Whether sole owner or part owner of the property, the Insurance Company must be permitted to prove whether or not it has paid privilege debts against that property, such as taxes and costs, etc., that are of the first rank. Civil Code of Louisiana, Arts. 2161 (2157), 3410 (3373), and the authorities there cited. The Insurance Company having paid these claims is subrogated by law to the rights of these prior creditors; and it would be a strange law and strange justice if the person who has a mortgage or privilege on a piece of property second in rank was not permitted to prove that he paid a prior privilege or mortgage claim against that property when he had the second mortgage, no matter if he afterward became the owner of the property on which a mortgage claim is asserted. If he had an interest in discharging the prior privilege or mortgage and did discharge it, he must be allowed that amount before any second mortgage creditor can recover any portion of this debt from the proceeds of sale of such property.

The testimony of T. A. Archer was offered to prove certain allegations in the answer, and it was objected to as *res inter alios acta*. It is alleged that the privilege and mortgage creditors were acting in good faith, but that all of them acted under a serious error of fact, and that Mrs Murphy is trying to enforce a claim when she acted in bad faith. If this is the real issue raised by the pleadings, is not the Insurance Company entitled to the evidence of Mr. Archer?

There are certain conditions in a sale that must be complied with. There must be a price, there must be the agreement of minds on all points, and the parties must have the ability to sell. If any one of these requisites is found wanting, it is incomplete. The property was adjudicated to all the privilege and mortgage creditors, and the act of sale sets forth the fact that the Factors' and Traders' Insurance Company took it in its own name.

Even if a power of attorney is required to enable one to act as agent in selling or purchasing real estate, in order to show the bad faith of plaintiff, alleged, and error of fact, defendant should be permitted to have Mr. Archer's evidence, and to know if he acted with her full knowledge of every step that was taken, and that she was aware of the purpose to purchase it in for the creditors, and that she knew of every material step taken in the bankruptcy proceedings; and that she assented to all that had been done, after the sale as well as before, and ratified every step; and that she had frequent conversations with Archer before and after the sale, who acted in no other capacity than for her, as Marshall J. Smith & Co., in liquidation, had no claim against Paul Cook & Co. of a privilege nature, and that the description contained in the act that he acted as such liquidator, was incorrect; a most serious error of fact.

It will be conceded that these parties all supposed that Archer, as liquidator, represented this $20,000 mortgage, at least one-third of the preference claims against the refinery, or the whole bankrupt proceedings would not have been carried on as they have been. The possession of the notes, transferable by mere delivery, in the form in which these are made, made proof enough to all parties to satisfy them that this firm in liquidation held and owned them. It was this condition of things which caused the preference creditors to sell and to buy.

How is the defendant to prove the error of fact without some evidence on the point to be given by the parties interested? Art. 1823 (1817), Civil Court of La., says: * * "To have that effect" (alluding to invalidation of the contract mentioned in the article), "the error must be in some point which was a principal cause for making the contract, and it may be either as to the motive for making the contract to the person with whom it is made, or to the subject matter of the contract itself." Error of fact will invalidate a contract, but it must be proved, or the fact of a cause for invalidation will never be known. It is like fraud in its scope, and probes for the cause or motive in making the contract. If that motive was a principal cause for making the contract, and there was serious error of fact, the contract will be set aside. It surely is expected to contradict the written act in establishing an error of fact; and to prevent the admissson of testimony to prove it is to be kept from establishing an error of fact. Only interested parties have need to establish an error of fact. No intermeddler would be permitted to do it, if he had no rights involved. It would be permitting courts to satisfy the whims of the curious, if they were permitted to raise issues that concerned no one that was before the Court, and did not concern even the curious.

The evidence of Mr. Archer, Col. Smith, W. J. Castell, Leeds Greenleaf, Mrs. Murphy and Col. Palfrey should have been admitted to enable the Court to fully pass upon the error of fact alleged in the answer. The evidence objected to was not offered to prove that Archer held the agency of Mrs. Murphy, but to prove the most serious error of fact, and the motive that induced the parties to act as they had. The ruling of the Court was erroneous.

ON THE MERITS

The writ of error was granted by the Supreme Court of Louisiana, the highest court of law and equity in that State, in which a decision in a suit could be had, where is drawn in question the validity of a statute of, and authority exercised under the United States, and the decision is against their validity; and where a title, right, privilege and immunity is claimed under a statute of, and authority exercised under the United States, and the decision is against the title, right, privilege and immunity specially set up and claimed by the Insurance Company, plaintiff, in error, under such statute and authority.

The judgment to be reviewed, that of January 31, 1881, interprets a United States Bankrupt Law, approved March 2, 1867, entitled, "An act to establish a uniform system of bankruptcy throughout the United

States" and amendments thereto, and the effect upon the title or property acquired at a sale ordered by the United States District Court for the District of Louisiana, in the bankrupt proceedings of Paul Cook & Co., and the cancellation of a mortgage privilege thereon under said statute and orders of said Court, and the validity of said bankrupt proceedings and the acts of said United States District Court and said statute.

The property was sold to the plaintiff in error by order of the United States District Court for the District of Louisiana, FREE FROM ALL ENCUMBRANCES, after due and legal notice to all the creditors of Paul Cook & Co. Printed transcript, page 67.

This defendant in error sues to enforce her mortgage privilege and rights on the property, notwithstanding such sale and notice, statute and action of the Court thereunder, and denies that her rights are affected thereby, and avers that said sale cancelled the mortgage privilege and rights of plaintiff in error on the property.

The plaintiff and defendant in error each hold a mortgage privilege for $20,000 with interest, of equal and concurrent rank on the property of the bandrupt, Paul Cook & Co.

The petition for writ of error to the Supreme Court of Louisiana is to be found on page 132 of transcript of record. It sets forth that the defendant in error claims the payment of the $20,000, interest, etc., or that plaintiff in error abandon the property to her, as alleged mortgage creditor thereon, in lieu of payment of said debt by mortgage note.

"Your petitioner alleges that in the original petition and answer it was averred, and in addition that the evidence adduced on trial of the cause shows, that on the 21st of February, 1871, Paul Cook & Co., were adjudicated bankrupts on their own petition, in the United States Court for the District of Louisiana, and surrendered the Orleans Sugar Refinery, the property concerning which this suit is brought, and *the right, title, interest and immunity to which is in dispute*, as among their assets; that pursuant to an order of the said United States District Court, the creditors of Paul Cook & Co. met in conformity with section 43 of the act known as the bankrupt act of the United States, approved March 2, 1867, and the amendments thereto, and at the date decided to have its affairs wound up by a trustee, under the inspection and direction of a committee of creditors; that at the time of the meeting of the creditors for the purpose of appointing a trustee, Marshall J. Smith was the agent of Mrs. Mary Murphy, plaintiff in this cause, and had in his possession, as such, the mortgage notes sued on in this case; that Marshall J. Smith, her agent, was appointed trustee, Leeds Greenleaf, Carl Cohn and Harmon Doane, were selected as the committee of creditors, that the resolutions were filed May 31, 1871, and approved by the Bankrupt Court on the 20th of June, 1871; that on the——day of December, 1871, the trustee, under the direction and advice of the committee of creditors, applied to the United States District Court for an order to sell the property upon which the mortgage, now sought to be executed, existed; that the Bankrupt Court on the first of December, 1871, in conformity with the request of the trustee, directed said property to be sold free of all encumbrances, that plaintiff, Mrs. Mary Murphy, had notice of such proceedings, through her attorneys and Marshall J. Smith, and that she acted through him concurrently with the other creditors of said bankrupts; that the property was sold in conformity with the order of Court free of all encumbrances, and was brought in by the Factors' and Traders' Insurance Company, for the benefit of all the mortgage creditors; that the State Court has held, notwithstanding, that Mrs. Mary Murphy had no notice of these proceedings in bankruptcy; that her mortgage was not released, and has abandoned the said property to be sold to satisfy the said mortgage debt; that the defendant, plaintiffs in error, herein, relied upon, and aver that the proceedings in the United States District Court, in the bankruptcy of Paul Cook & Co., were proper, valid and binding on her; that Mrs. Mary Murphy, plaintiff, was bound thereby; that the State Court holds that the mortgage of Mrs. Mary Murphy, the plaintiff in this case, is not canceled and erased, but is still existing; that the mortgage of the plaintiff in error, defendant in this case, concurrent with Mrs. Mary Murphy's, has been held by the State Court to have been erased and canceled under the proceedings; that, in holding that the mortgage of Mrs. Mary Murphy is still alive' good and binding on the property, notwithstanding the proceedings in the bankrupt court, that the Factors' and Traders' Insurance Company's mortgage is extinguished, the right, title, interest and immunity which the Factors' and Traders' Insurance Company has, and had, by the proceedings in said bankruptcy proceedings, and in conformity to the laws of the United States, are by said decision invalidated and destroyed; and that one of the questions at issue in this case is whether the proceedings so had in the Bankrupt Court, under the statutes of the United States, are legal and binding, and all the requisites of the same had been complied with or not, and that the decision of the Supreme Court of the State of Louisiana is against the right, title, interest and immunity set up and claimed by the plaintiff in error herein, under the bankrupt law of the United States, an act approved March 2, 1867, and amendments thereto, and that this plaintiff in error is entitled to have the same reviewed by the Supreme Court of the United States."

In the original suit in the State Court, Mrs. Widow Mary Murphy sues to enforce her mortgage privilege on the real estate that she admits was purchased by that plaintiff in error under proceedings, making the title, that were all carried on under the United States Statutes and in a United States Court.

That such statute and proceedings conveyed it by a title perfect as a conveyance.

The plaintiff in error claims that it purchased the property free from encumbrance under the statute and order of said court.

In other words, the defendant in error claims that the United States Statute and Court had full authority to convey the property by good title to the Insurance Company.

The main question, therefore, in this cause refers to a title to the Orleans Sugar Refinery acquired free from encumbrances, under the United States Bankrupt Law, approved March 2. 1867, and the proceedings in the in the United States District Court for the District of Louisiana.

The evidence before the Court is clear enough to give the Insurance Company the relief asked for. The main issues, as presented by Mrs. Murphy, are the fact of a sale, and that all the privileges and mortgages save hers have been canceled, and a claim that the Insurance Company must pay the $20,000, with interest, from March 21, 1871, at eight per cent.

Certainly the rights of Mrs Murphy cannot extend any further than the property on which she held a mortgage. Paul Cook & Co. owed her on the notes and gave the mortgage to secure debt. The Insurance Company has not assumed the payment of the notes, and the most serious judgment that could be rendered would be in the alternative.

POINTS OF EVIDENCE.

On page 35, Archer's testimony shows that the notes of Mrs. Murphy were in his possession until late in 1873, and that he and Mrs. Murphy each had a key to her bank-box, in which they were, and that the bank-box was in his possession all this time.

This is also established by the evidence of Mrs. Murphy and her son, and by Marshall J. Smith, except that Mrs. Murphy and her son say that Mrs. Murphy got the notes from Archer in January, 1873. Page 55. On page 35, Archer's testimony shows that he had several conversations with Mrs. Murphy and with her son; that she called at his office; and that she knew of all that had been done; that she made no objection, and asked him from time to time how matters were progressing.

Q. "Did she ever say anything, or do anything, that indicated that she repudiated anything that you had done?"

A. "Never, until Mr. Coleman (her attorney) told me so; since he had charge of this case."

On pages 35 and 36, Archer's testimony is that she had full knowledge of sale and talked it over afterward, and that all was explained to her. Archer says, "I bought it in myself, and I represented Mrs. Murphy, at least that was my belief at the time. I am certain that I informed her of the nature of the proceedings several times."

Q. "Did you explain to her what interest was secured to her?"

A. Yes, sir, I did. I told her she would have her *pro rata* with all other mortgage and privilege creditors."

"She gave her tacit consent. We had many talks about it."

It will be seen by reference to page 36 that an effort was made to prove what the object of the meeting of creditors was, and that Archer, who was there, represented Mrs. Murphy, and that it was so understood by all.

On page 37, Archer's testimony shows that Mrs. Murphy came to see him two or three times after the sale, and that she often went to his office in Poydras street, and that he always told her that she would get her *pro rata*.

What condition is most natural? that of affairs as mentioned by Mr. Archer, considering the years of trouble, the decline in property, the amount involved, and the fact that everybody in the land knew that the bankrupt law was being enforced and invoked on all sides in those days of depression and shrinkage, or that as described by Mrs. Murphy? Your Honors will certainly presume that Mrs. Murphy, who cannot read or write, used her eyes, her ears and her tongue to get information, and that the condition of affairs that she testifies to did not exist in this age of the world, and in the absence of miracles.

On pages 39 and 40, Marshall J. Smith testifies that he held her power of attorney, executed before W. J. Castell, notary, and also the notes; and that he held both for years, and was very intimate with her. Mr. Archer was the partner in Marshall J. Smith & Co. Col. Smith says that he had interviews with her after the sale, and explained everything fully; that the property was bought for her account; and he says that two months ago she told him she would like to sell the notes—would take one-half for the amount due her.

He says: "She understood as thoroughly as any one her interest. It was fully explained by me. She never raised any objection. I advised her of the mechanics' prior lien ; told her she was to get her portion of the $65,000 of claims. She knew well that this was her interest."

The evidence of Mrs. Murphy denies knowledge of what was done—denies ratification or assent. She claims that all the while she only asked when she would get her money. It is entitled to little weight as evidence, for it is mere denial all the way through, and is directly contradicted by Col. Smith and Mr. Archer. She is a most interested witness, and the presumptions are all against her not having had knowledge of what was going on, and not acting in the matter when so much was at stake. Why should she have tried to sell these notes? She did try, and she certainly learned what condition everything was in. On page 55, she says her son came of age on 27th November, 1872, and got her bank-box in Jan'ry, 1873.

But she contradicts herself several times. On page 58 she says her son told her of the sale, and on 58 she says it was Mr. Coleman first told her of it, and on page 59 she heard it outside, among the people, and on page 60 she says, "I never heard of the sale until Mr. Coleman told me of it lately ;" and on 60 she says she heard of it when he bought it, and on 61 that her children talked about it. She also contradicts Mr. Castell in her testimony. He is a third person, and a most credible witness. What person would "look to the notes" as she says she did for her money, when those notes have only the names of bankrupts in them, who have no property or effects, save mortgage real estate which alone secures them.

She talked with Patrick Irwin about it, and he told her the notes were almost worthless. He told her of the bankruptcy. She told Castell that Smith and Archer held her notes and represented her. Pages 50 and 51. Castell says, page 50, "I don't think she is a person that understands what it was," alluding to the sale of the property.

On page 61 James Murphy's testimony shows that he got the notes from Archer, of Marshall J. Smith & Co., and on page 63 he denies having any information from Smith or Archer, while on 63 he says Archer told him it was a mixed-up affair.

On page 55 Col Palfrey's testimony shows that Mr. Castell came to see him after the sale, just as Mr. Castell said; that his Insurance Company had always been ready to pay Mrs. Murphy, when her interest can be known. On 53 he says that Castell and Coleman came after the sale to learn the interest that Mrs. Murphy had. He says: "I understood that Marshall J. Smith & Co. held the notes; we held two." This clearly shows the interest and the motive to make the sale.

Lagan & Mackison and Leeds & Co.'s privileges were recorded. Page 46.

The adjudication in bankruptcy is to be found on p. 65, and on pp. 65 and 63 the order to homologate resolutions, etc., and the statement of costs paid.

The motion to sell free from incumbrances, reserving rights of privilege creditors to fund in trustees' hands, is to be found on p. 67, and on 69 the petition for homologation of sale and order.

The motive that actuated all the parties to the sale was to take the property to best secure the privilege and mortgage claims on it, and save costs and expenses. It was supposed that all the parties to the act, and to the entire proceedings relative to the property, were creditors of that class. They intended to secure themselves. The principle cause—the one contemplated by the law as found in art. 1823 (1817) of the Civil Code of La.—was to secure the debts as far as possible. There were $65,000 of secured debts, and the property was bid in for $45.000. These creditors did not take the action in the premises that was supposed to be that of all, to cancel their own claims, save one for $20,000. Civil Code of Louisi-1825 (1819); C. C., of La., 1896 (1890), as to cause of action; 19 L. 140; 2 R. 163; 12 R. 302. 15 A. 268, 270.

The condition of affairs contemplated by art. 1826 (1820) Civil Code of La., applies to this case, because, from the nature of the transaction, it must be presumed that Mrs. Murphy knew it, as the holder of notes like these, having possession and representing them, is believed to be the owner.

As stated in regard to the right to have the evidence of Archer to show whether there was an error of fact or not, "if there be no such cause, where one was supposed to exist, or if it be falsely represented, there can be no valid consent." C. C. of La. 1824 (1818); 1827 (1821); 5 N. S. 260; Tanner vs. Robert, 6 L. 511; N. O. vs. Blaché.

The "error as to the quality or character in which the party acts, as well as a mistake as to the person himself, invalidates a contract when such quality or character is the principle cause of the agrement." C. C. 1838 (1832,

It was believed that Thos. A. Archer, liquidator of Marshall J. Smith & Co., represented these notes of $20,000, and the contract, if this was not so, should be as void as if one contracted with an heir of a deceased person who was not such heir. C. C. of La., 1838 (1832); 4 L. 456. See, also, C. C. 1839 (1833), and 1840 (1834).

Mrs. Murphy, if she contributed by her silence, or by her assent, or by ratification, can not derive any benefit therefrom. It would be permitting her to profit by her own wrong. It must be conceived that Mrs. Murphy either purposely deceived the other parties to the sale, or she now attempts to repudiate what she either ratified or assented to. It is allied to fraud in its nature, as contemplated by art. 1847 (1841) C. C. of La.. (1), (5), (6), (11).

It may be that Marshall J. Smith mislead her for reasons of his own, but she should suffer if so as she made him her agent.

In the case of the Union Bank of Louisiana vs. Beatty et al., 10 A, 376, the Court said: "It is undoubtedly true that the securities could not set up this defense, if it was based alone upon fraud which their principal practiced upon them; *but it is based also upon error of facts, and that error was a common error, both to the bank and themselves, and induced by the acts of the bank as well as of Marchais.*" In that case, it was claimed that "the sureties could not avail themselves of a defense which is founded in the nullity of the contract as between themselves and the creditor, from whatever cause it arises;" but the Court said that the law and the equity were in perfect harmony, and relieved them from the contract.

In Theriot vs. Chaudun et al., 17 L. 448, the Court said: "The price stipulated for the plaintiff's pretensions was a large one, and in a case of doubt we would incline in favor of a party striving to avoid loss against one seeking to obtain a gain."

Mrs. Murphy is striving to enrich herself at our expense. We have acted in good faith, and have striven to protect and preserve the property, have paid taxes, costs of courts, etc., and have made repairs, not for ourselves, but to protect her rights in common with ours, and she, in turn, desires to take advantage of all our acts, performed in perfect good faith, and hold us to pay a debt of $40,000 that we never contracted, and that we never assumed, or to give up the property to her.

She has not acted in good faith, but in bad faith —the testimony shows—and there is no moral or legal obligation resting upon us to pay her anything more than her just *pro rata* from the proceeds from the sale of this property.

The sale should be rescinded, or she should not be allowed to recover any greater rights than she had when Paul Cook & Co. owned the property. The property was to be sold and was ordered sold free from encumbrance. This would cancel her mortgage and give her *what was reserved*, *her rights*, and ours, on the property as it now stands. It was bought for all, in truth and in fact, that had a mortgage and privilege on it.

The Insurance Company confidently asks the court for relief from this unjust demand—from this attempt to recover what does not belong to Mrs. Murphy—from this attempt to enrich herself at our expense. The Insurance Company lost a large sum by the failure of Paul Cook & Co. The refinery is of little value, and to force us and the other privilege creditors to abandon the property to Mrs. Murphy, which would not bring enough to satisfy her large and unjust demand, would be to make the innocent suffer and to aid the guilty, as Mrs. Murphy *did know of every step taken to secure* her claim in common with others.

The Factors' and Traders' Insurance Company only hold the property for the benefit of all privilege and mortgage creditors. She must share with them after the amount paid for costs, taxes, repairs, etc., $11,454.83, is allowed to the Insurance Company.

The Insurance Company should have been allowed to show these disbursements for the purpose of saving the property from the tax-gatherer and the rotting influence of time on old property.

Mrs. Murphy has done nothing to protect the property, and now she would enrich herself by our earnest effort to protect the property for her interest in common with ours.

In the bankrupt proceedings of Paul Cook & Co. Marshall J. Smith was chosen the trustee of the creditors. He was the agent of Mrs. Murphy at the time and long afterwards, and held the notes. Notice to him was notice to her. He could not divest himself of the knowledge of the fact of such notice. See Factors' and Traders' Insurance Company vs. Marine Dry Dock and Ship Yard Company, 31 La. An. 152; 38 Barbour, 527.

"These officers having taken advantage of their position as officers to practice a fraud upon the plaintiffs by wrongfully concealing their certificates of stock and transferring it in new form to others, things which they could only by reason of their official position. The corporation is undoubtedly liable for their acts. 38 Barbour, 527."

If Marshall J. Smith did not inform the other secured creditors that his firm in liquidation did not OWN the notes that he held, there was a constructive fraud practiced upon them, and surely there was an error of fact underlying all the acts of the other secured creditors in the premises.

The clause in the act of mortgage, relative to the effect of the mortgage, is "in favor of the said Samuel L. Moss and to *enure to the use and benefit* of any and all future holder or holders of the said notes." See Rec. page 4.

No amount of search would have found any evidence of Mrs. Murphy's claim on the notes. That knowledge was in the possession of Mrs. Murphy and Marshall J. Smith and Thos. A. Archer only.

How or where could the Insurance Company find that Mrs. Murphy had any claims on the notes? Not by search, not by the records. The holders of the notes must be considered the owners at that time; the laches, if any there were, are those of the real owner, else there is fraud.

Moreover, what is the prayer of the plaintiff's petition. It prays for a personal judgment, and that plaintiff's mortgage be recognized by sale of the property to pay the debt.

The prayer is not in the alternative. It is for a personal judgment, and mortgage recognition. There is a seeming inconsistency in the prayer.

Paul Cook & Co. have given a mortgage for $40,000 on this property. The Insurance Company certainly held and owned the notes for the $20,000 that were secured by that mortgage. The bandrupt proceedings show this. See pages 23 and 47 for signatures.

Some persons held the notes for the other $20,000 secured by that mortgage. This is undisputed. But the ownership of those notes is disputed. There was nothing in the mortgage or the notes, that indiccated the ownership of Mary Murphy. The notes were good in the hands of any holder. The act of mortgage stipulates this fact. The notes to the amount of $20,000 were not overlooked. The act of mortgage fixed the amount secured, and no one can believe that one-half of the notes so secured were not held and produced in such important bankrupt proceedings.

They were represented by Thos. A. Archer, liquidator; were held by him; and who would have asked if Mr. Brown, or Widow Jenkins, or anybody else owned them, when so presented? The Register in Bankruptcy must demand the evidences of debt. He is an officer of court, and must be presumed to have done his duty.

Mr. Randolph the attorney of Insurance Company, Mr. Cuvillier the notary and Mr. Doane the president of the Insurance Company, the three most active in the whole proceedings were dead. They could not speak for themselves when this case was tried. Why was not this suit brought during the time that the voice of each could be heard in defense. It was not brought until one week before the accruing of prescription upon the notes, and until these witnesses were dead and voiceless.

They could not add their evidence to that of Marshall J. Smith and Mr. Archer. If they could, she would not of dared to dispute the word of such gentlemen. As it is, she is outweighed in evidence, by four credible witnesses. The weight of evidence we respectfully urge should be decreed against her. And she was the plaintiff examined as a witness by the defendant, at the suggestion of Mr. Smith, who was very confident that she would support him. He surely would not have sought her examination, if he had imagined that she would so directly contradict him and say that he had said things she never heard before.

She was deeply interested. Women are poor witnesses to facts. The members of this Court have had large experience at the bar, and will judge if this is a rash assertion.

All the secured creditors of Paul Crook & Co were supposed to be acting for their mutual protection.

That was their motive in having a trustee. They selected Marshall J. Smith. He was supposed to represent one-half the mortgage debt, because he held the notes and must be considered as the owner by that fact. Perhaps he told them that he or his firm owed them. It would have been rather stupid to have asked that question, when he held them. Who would have asked the Factors' and Traders' Insurance Company's president if he owned the $20,000 in notes that he held, or if some bank or other insurance company owned them ?

It is begging the question however to say that in this case an agent was buying or selling real estate.

On the contrary, the evidence of everybody that has testified in this cause shows that certain notes amounting to $20,000, on their face good, were in the hands of the holders (Marshall J. Smith) with no title or mortgage recorded that could show any right of any other person thereto. Therefore the mortgage creditors were acting as prudent business men when they had the property of Paul Cook & Co. sold and adjudicated.

Marshall J. Smith & Co., in liquidation, were not secured creditors of those bankrupts, unless they held those notes. *They had no other secured claim.*

Thos. A. Archer, after the other member of the firm Marshall J. Smith became trustee of Paul Cook & Co.'s bankrupt estate acted solely as the agent of Mrs. Murphy, or those proceedings. He so testifies, and he should have been permitted to prove the fact, fully.

In the case of Barriere vs. Peychaud, 14 La. An. 371, a case similar to this in many respects, the Court said:

"The conduct of plaintiff creates the impression that he was willing to allow Gauthier to represent him until the other creditors had consented to the compromise, and then that he intended to deny the agency of Gauthier, and seek to collect the whole amount of his debt."

"If plaintiff can succeed, it would certainly work a great injustice to the creditors, who were parties to the compromise, and also to the endorsers of Peychaud, for the former consented to the release, without doubt, upon the supposition that all who held notes drawn and endorsed by him and Hebrard had agreed to the compromise, and that the property and future exertions of Peychaud would be devoted to the payment of thirty per cent. only upon those debts; and the endorsers—Deverges, Forstall and Deloche—doubtless were influenced by the idea that the property and labors of Peychaud would suffice to guaranty them against loss by being responsible for thirty per cent., although they might not be, if any particular creditor should be paid in full."

"Gauthier is a competent witness to prove acts done within the scope of his agency. The objection, on the ground of his liability to actions for damages and the costs of this suit, if he falsely represented himself as agent, goes simply to his credibility. 1 Greenleaf on

Evidence, § 416; Phillips, vol. 1, p. 52; 1 La. An. 399; 4 La An. 409; Ibid. 540."

"If Gauthier was not so authorized, it was his duty to have repudiated the agreement as soon as he was notified of it. He did not do so; he is, therefore, presumed to have ratified it, and is bound by it."

In the evidence of Marshall J. Smith is found this direct inquiry and answer.

Q. "Who attended to her business after her, Mrs. Murphys, husband's death?"

A. "I held her power of attorney from the time that he died until the son arrived at the age of majoriy."

He expressed perfect willingness to produce it when it was called for, and plaintiff's counsel, as the case was continued on that day, did not demand it again. Neither did Mr. Smith appear to testify again. It was a notarial act.

His absence is accounted for by sickness, when *plaintiff's attorney waived his appearance.*

He has previously testified as follows:

Q. "Did you ever have any interview with Mrs. Murphy after you made the sale of this property of Paul Cook & Co. in bankruptcy?"

A. "Yes, sir."

Q. "State what explanation, if any, you made to her in reference to that transaction?"

A. "I can't give the exact words of the explanation, but I explained to her time and time again how the transaction stood, how the records stood. But time and time again, before I gave up the power of attorney, I would explain to her all these matters, and she would come up and ask me how it was her property was not sold and when the property would be sold. I explained to her the depressed condition of real estate, and the interest she had in the property, and, so far as I could see, if she understood anything she understood her interest."

Q. "Did you or did you not explain to her, and represent to her, that that property was bought for her account ?"

A. "Yes sir, I always explained it to her so."

* * * * * *

"I think it is about two months ago that she came to me and said that she would like to sell her interest."

* * * * * * * *

"I never attended personally to Mrs. Murphy business since, but I went around to Mr. Archer and got him to go and see Mr. Palfry, to see if he would not buy the notes. She understood as thoroughly as any one her interest, it was no fault of mine what her interest was, and I wanted to get her something, because when the property comes to be sold there will be very little for any of them ; I have been anxious for her to get something."

Q. "*Did you represent to her how her interest was secured !*"

A. "*I have represented it to her as well as a man could posibly explain anything to a person.* I explained it to her in the presence of her son, and he understands."

Is not this to be credited ? Is it not reasonable ?

He said further :

* * * * * * * *

"I think the whole amount was some $65,000, and that she had a proportion of $20,000 in this property that was bought in."

Q. "You mean the entire amount for $20,000?"

A. "Not $20,000, because she knew very well that if the property wouldn't bring it she couldn't get that amount. She knew very well what her interest is."

The evidence of Mrs. Murphy's son is of no weight. He knew nothing; never did any business.

Who could tell from her evidence that anybody but Mr. Smith represented her? She says, "It was Mr. Smith that was the agent."

Who could tell from the evidence when she first heard of the sale? She contradicts herself over and over again as to when or how she learned it. Such evidence should not outweigh that of four men of credibility. It is miserably weak.

Surely the testimony Mrs. Murphy gives will not break down straightforward, business-like reasonable evidence of men whose enlightened selfishness would certainly guide them better than to such a course as she indicates.

The Supreme Court of Louisiana, in similar cases, have said:

"*The price stipulated for the plaintiff's pretensions was a large one, and, in case of a doubt, we would incline in favor of a party striving to avoid loss against one seeking to obtain a gain,*" 17 La. R. 448. Theriot vs. Chandron et al. See 13 La. A. 477; 31 La. A.

100; 31 La. A. 52, 725, 149; 29 La. A. 320, 274. Rev. "Statutes of La. 1942, 2903."

1. Knowledge, of a trustee in bankruptcy, that notes transferable by delivery are owned by any one is knowledge of the agent who holds them, when that agent is also the trustee in bankruptcy; and it is notice and knowledge for the real owner so far as other creditors are concerned, who deal in good faith with such agent, believing him to be the owner. 31 A. 152 Factors' and Traders' Insurance Company vs. Marine Dry Dock Company, and 48 Barbour, 527, Bankrupt Act of 1867, § 5103, C. C. of La, now 3343 on Third Persons.

2, Ratification of acts done by another for the benefit of any person, or the one that acted by parole or written evidence. 21 N. Y. 255, Commercial Bank vs. Jones, 18 Texas; 1 N. Y. 444; 46 Maine 176; 33 Com. 95; 4 Allen 447; 3 Laws 174; 32 Ills. 387; 7 Hump. 224.

20 A. 90; 3 A. 464; 6 A. 540; 18 A. 546.

29 A. 679; 20 A. 215; 22 A. 496; 22 A. 462.

Mrs. Murphy could not read or write; she always acted, therefore, through an agent and upon information obtained from others, as she could not tell a note or act of mortgage from an insulting letter or a quack doctor's certificate.

The notes and mortgages were duly represented, and there is no evidence of any agency so far as the act of sale or the bankruptcy proceedings are concerned.

There was no necessity for a power of attorney. The act shows that somebody represented them. Her position admits that Under the pleadings the Insurance Company proceeded to show who represented them.

If she permitted the person who held the notes, *good in the hands of any holder*, by the language of the act of mortgage, having no name on them but Paul Cook & Co., to be thus represented, she is bound by the act of her agent. The loss should fall on her. The act of mortgage, nothing whatever existed to show the ownership in Mary Murphy; she was silent for years, and then sued the Insurance Company, claiming that she knew nothing of what had been done, and that she had not asserted to any act or certified any, but could now extinguish all claims against the property but hers.

There is no presumption as to the receipt of proceeds of sale. The act of sale and the adjudication and the whole proceedings *actually express the fact* that it was entered into for the benefit of those secured creditors and so bid in by them, and that *not a dollar of money was paid.*

The case presented by Mrs. Murphy is one entirely devoid of equity, and considering her capacity and conduct it seems clear that these are speculative proceedings, so far as she is concerned.

The case of the appellant shows the utmost good faith and the conviction that these business men transacted the business to preserve the rights of all and not to deprive any one of his just pro rata as mortgagee or privilege creditor.

Was not Smith's action at the first meeting of the creditors binding on her? She was bound, because

Smith was her agent; but if he was not, still she was bound, because the law bound her.

Section 5103, Bankrupt Act, formerly Sec. 43, says: "Such consent, i. e., that the estate shall be wound "up by a trustee, etc., and the proceedings under it, "shall be as binding in all respects, on any creditor "whose debt is provable, who has not signed the "same, as if he had signed it, and on any creditor "whose debt, if provable, is not proved, as if he had "proved it." The committee of the creditors is the representative of all. The intent and effect of this section of the Bankrupt Act was, that all the ordinary processes and proceedings were superseded by the appointment of a trustee. In re Trowbridge, 9 B. R., 274. The trustee, under the direction of the committee, can dispose of assets, and settle the estate without special orders in each matter before them.

In re Darbey, 4 B. R., 211, 309.

In re Zinn, 4 Benedict, 500.

In re Trowbridge, 9 B. R., 274.

By providing that over the settlement and distribution the committee should have the direction, the statute, has withdrawn control over them from any other power, and, to that extent, superceded the ordinary proceedings in bankruptcy.

In re Jay Cook & Co., 11 B. R., 1.

We are fully persuaded that no further notice to any creditor was necessary in order to dispose of the property free of incumbrances.

But, that no doubt should exist as to that matter, a meeting was called to consider the question of selling it. The committee instructed the trustece to sell free of incumbrances. Burrows, Lobe, Simond and W. D. Winter, 1st National Bankrupt Register, page 481; 3d National Bankrupt Register, pp. 453, 75, 347. That resolution was given to M. J. Smith, the trustee of the creditors and the agent of Mrs. Murphy, and, upon Smith's application, the order was made to sell it. No creditor complains, or has ever complained, except Mrs. Murphy, whose own agent was the trustee. In the case of Ray vs. Norsworthy, 23 Wallace, 136, (so confidently relied on by appellee), the court said: "Notice must be given in some form in all cases," and that "a judgment, order, sentence or decree of a court "disposing of property, subject to conflicting claims, "will not affect the rights of any one not a party to "the proceedings, and *was never in any way notified* of "the pendency of the proceedings." *The notice to her agent was notice to her.* Besides, she was, as a *matter of fact*, notified and kept fully advised by Marshall J. Smith, her agent. The facts and proceedings were fully communicated and explained when Smith and Archer testify directly on this point They had no interests except as her friends and agents, to secure her rights as far as possible.

They had no motive, on the witness stand, to swerve them from the truth, ar induce them to color the facts. There was no $20,000, with eight years of interest before them, to cloud their recollection, or befog their knowledge of the facts. Besides, if the Court will but read her testimony, her continual evasions, in answering qnestions, will abundantly appear.

But beyond all this: Having been fully advised of what was done—That the Factors' and Traders' Insurance Co. had taken the property for her benefit as well as theirs—That no money had been really paid by the Insurance Company for the property; she fully ratified the proceedings and confirmed the acts of both Marshall J. Smith and Archer, and cannot now be heard to gainsay them.

How could Mrs. Murphy be notified of the bankauptcy proceedings personally? Her name was unknown. Smith and Archer holding them, appeared

The argument is made that Mrs. Murphy could not ratify "acts done without her authority." Such is not the law of this country. Not only can they be ratified when done by one who assumes to be an agent, (see Condit vs. Baldwin, 21 N. Y., 225; Commercial Bank vs. Jones, 18 Texas; 1 N. Y. 444), but a party may even ratify a *forged signature.*

Forsythe vs. Day, 46 Maine, 176.
Union Bank vs. Middlebrook, 33 Conn., 95.
Greenfield Bank vs. Crafts, 4 Allen, 447.
Howard vs. Duncan, 3 Lans, 174.
Livings vs. Wilder, 32 Ill., 387.
Fitzpatrick vs. School Commrssioners, 7 Humph., 224.
11 La. Rep., 286.

In Louisiana, if the agent disobeys instructions, the principal can adopt and ratify the act. Sysmanski vs. Plassan, 20 Ann., 90; also, 3 Ann., 464; 6 Ann., 540.

So if the agent exceeds his authority, the principal may ratify and become bound. Overby vs. Overby, 18 An., 546; Sentell & vs. Kennedy, 29 An., 679.

And that ratification may be as perfect, through silence, as by the most solemn act in the world.

A principal who fails to make objection to the acts of his agent, when notified thereof, is bound thereby. Mangam vs. Bell, 20 Ann., 215.

He must repudiate as soon as informed of the facts. Ball vs. Bender, 22 Ann., 496.

If he allows anything to pass in silence, he will be considered as having ratified it. Oliver vs. Johnson, 24 Ann., 462.

In the case of Zung vs. Mrs. Courcelle, 16 Ann., there was no agency, nor pretended agency; nor was there any act therefore to ratify.

It is very evident that in the act of transfer from Smith, trustee, to the parties named, that Archer was merely interposed because Smith could not appear in the same act as vender and vendee.

We call it a *transfer*, because there was no real sale; no money nor other valid consideration passed, nor was any ever contemplated. It was done solely to get the property out of the bankruptcy proceedings, and to place it in the hands of those interested to dispose of it upon term best suited to realize the most money for them all True, it bears the form of a perfect sale, but it was not the intention of any of the parties interested that it should be one. If it had been, the $15,000 would have been paid to M. J. Smith, trustee; but the price was not paid. It was clearly intended to protect the interest of the holders of the mortgage notes and privileged debts, and no others.

The Factors' and Traders' Insurance Company was to hold the property for the benefit of all. It was acting in good faith. It is now in good faith. Can the same be said of Mrs. Murphy ?

The Louisiana Courts have repeatedly held that, an act though in form of a sale if intended to be only a mortgage or pledge would be held as it was intended.

When the property shall have been disposed of, and the funds ready for distribution, then, and not till then, will the question properly arise as to the legality or illegality, the priority *vel non*, of Leeds & Co.'s claim. They recorded their claim immediately upon its approval. The machinery they placed in the Orleans Refinery, and the work they put upon it, made it of many thousands of dollars more value than it was. She strives to enrich herself at their expense. She seeks to enrich herself at the expense of the Insurance Company.

The "auri sacra fames" seems to have possessed her wholly.

Moreover, Mrs. Murphy alleges (page 2) in her petition that the Factors' and Traders' Insurance Company own the two notes of $10,000 each, which conflicts with her allegation of a sale.

But the sale of the property free from all encumbrances was made by the United States Court, sitting in bankruptcy causes. That sale cannot be annulled in whole or in part by another court. The court that rendered the judgment can alone annul it. And the

State Supreme Court of Louisiana has so held in 31st An., p. 104, Factors' and Traders' Ins. Co. vs. DeBlanc et al.

" A sale made under a decree of court can only be annulled in the court which rendered the decree."

The bankrupt schedules of Paul Cook & Co. were offered in evidence by the Insurance Company, but the Court would not admit them as evidence. Rec., bottom of page 48. Therefore, the full list of secured and unsecured creditors is not before the Court, and the exact position of parties to be notified, cannot be determined.

Reserving all mortgage rights, and mentioning no amounts, Marshall J. Smith & Co., and the Factors and Traders Insurance Company, signed the resolutions of Paul Cook & Co., creditors. Page 66.

Marshall J. Smith & Co., had no mortgage rights save for the $20,000 notes which were in their possession, and which Mrs. Murphy at this late day claims were hers. She now repudiates any action that was had concerning them save that the property was sold.

The procceedings for the sale of the real estate of Paul Cook & Co., bankrupts, in the U. S. Court, are regular, and conveyed the property to the Factors' and Traders' Insurance Company free from all incumbrance. It is held by the Company for the benefit of all the named creditors, and when sold, the proceeds will be divided among those named creditos. It will then be proper for Mrs. Murphy to claim her interest therein. If the sale she invokes is good, it is an entierty and conveyed the property free from encumbrance.

The judgment of the Supreme Court of Louisiana should be reversed in all respects.

Respectfully submitted,

G. L. HALL,

April 22d, 1884. *Of Counsel for Plainteff in Error.*